Supreme Court, U. S.
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No. 79-1148

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

NAGATA BROTHERS FARMS,

*Petitioner,*

VS.

THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,

*Respondent,*

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

*Real Party In Interest.*

## PETITION FOR A WRIT OF CERTIORARI

## TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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No. ____

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UNITED FARM WORKERS OF AMERICA, AFL-CIO,

*Real Party In Interest.*

## PETITION FOR A WRIT OF CERTIORARI

The petitioner, NAGATA BROTHERS FARMS, respectfully prays that a writ of certiorari issue to review the California Supreme Court's denial of a hearing to review the decision and order of the Agricultural Labor Relations Board, State of California, filed in this proceeding on May 23, 1979.

## DECISIONS AND ORDERS BELOW

The unreported decision of the Administrative Law Officer of the Agricultural Labor Relations Board, State of California, appears in the separately presented Appendices as Appendix A.

The reported decision and order of the Agricultural Labor Relations Board, which is officially reported at 5 ALRB No. 39 (1979), is Appendix B. The order of the Court of Appeal summarily denying a petition for review is Appendix D. The order of the California Supreme Court denying a petition for hearing is Appendix F.

## JURISDICTION

The opinion of the Administrative Law Officer, Appendix A, was filed with the Agricultural Labor Relations Board on May 9, 1978. The decision and order of the Agricultural Labor Relations Board, Appendix B, was filed on May 23, 1979. A timely[1] petition for review before the California Court of Appeal was filed by petitioner on June 21, 1979, as evidenced by Appendix C. The Court of Appeal's order denying the petition for review was filed November 16, 1979, as evidenced by Appendix D. A timely[2] petition for hearing before the Supreme Court of California was filed by petitioner on November 26, 1979, as evidenced by Appendix E. The Supreme Court's order denying a hearing was dated December 13, 1979 as evidenced by Appendix F. This petition for certiorari was filed within ninety days of December 13, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

1. Whether employees who reside on an employer's private property without permission have a First Amendment right which requires the employer to grant union organizers unfettered vehicular access to his property.

[1] Within 30 days after the filing of the decision of the ALRB. (California Labor Code Section 1160.8).

[2] Within 10 days from the filing of the decision of the Court of Appeal. (California Rules of Court 28(b)).



2. Whether the California procedure for review of Agricultural Labor Relations Board decisions which permits a petition for review to be summarily denied, without statement of reasons or full consideration of its merit, is an unconstitutional denial of due process.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

On November 22, 1977, the UNITED FARM WORKERS served upon petitioner a Notice of Intent to Obtain Access[3] to petitioner's fields known in these proceedings as the Wilshire

[3] G.C. Exh. "1G." The notice and negotiations were pursuant to Agricultural Labor Relations Board Regulations, Title 8 Cal. Admin. Code § 20900.

Ranch (hereinafter the "Ranch"). Scott Washburn, a UFW organizer, delivered the Notice to Harry Nagata at petitioner's business office on the morning of November 22, 1977. At that time, a conversation took place between Washburn and George and Harry Nagata.[4] During the conversation, Washburn informed petitioner that the UFW was intending to "take access"[5] and either threatened or predicted that the UFW would be filing charges against petitioner with respect to access.[6]

The following day, on November 23, attorneys for petitioner and other growers in the area that had received UFW Access Notices met with Marc Roberts, the Regional Director for the Board, and Washburn to negotiate an access agreement.[7] During the meeting, Washburn was informed that petitioner's agricultural employees got to work at approximately 6:30 a.m., had lunch breaks from 11:00 a.m. to 11:30 a.m., with a second shift from 11:30 a.m. to 12:00 noon, and work was completed at either 3:00 p.m. or 3:30 p.m.[8]

During the November 23 meeting, petitioner agreed that UFW organizers could enter the Ranch in their cars beginning at 5:30 a.m. with a foreman escort. The UFW organizers would be allowed to remain until the crew started work, at which time the foreman would escort the UFW representative out of the fields.[9]

Petitioner proposed that UFW access commence shortly before 11:00 a.m. when the catering truck arrived. The catering company had its own lock to the vehicular access gate; the Petitioner's proposal was that the caterers would open the gate and UFW organizers, if they chose to enter by car, would drive in behind the catering truck while the crews ate their lunch.[10]

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[4] R.T., Vol. III, p. 106, l.6-p. 107, l.7; Vol. IV, p. 19, l.15-p. 20, l.12.

[5] R.T., Vol. III, p. 108, l.11-18.

[6] R.T., Vol. III, p. 109, l.5-6; Vol. IV, p. 20, l.19-21.

[7] R.T., Vol. V, p. 60, l.12-p. 61, l.21.

[8] R.T., Vol. III, p. 62, l.24-p. 63, l.10.

[9] R.T., Vol. III, p. 63, l.19-p. 64, l.24.

[10] R.T., Vol. III, p. 65, l.23-p. 66, l.15.



Petitioner expressed concern regarding the damage that could be caused by UFW organizers' vehicles if operated in the fields at too great a speed; it is for this reason that petitioner required the catering truck escort. Since the catering truck would probably leave the Ranch before the end of the lunch periods, petitioner proposed that the foreman escort the UFW organizers out of the Ranch shortly after 12:00 noon. The UFW did not raise any objections to petitioner's proposals at the November 23 meeting.[11]

Due to the prolonged discussions, the meeting ended before any meaningful discussion could be had concerning the mechanics of UFW access after working hours.[12] However, petitioner was prepared to agree to vehicular access for one hour after work procedurally comparable to its proposals with respect to access before work and during the lunch hour. At the conclusion of the meeting, it was understood that ALRB Regional Director Roberts would meet with the UFW and then get back to petitioner and the other growers to schedule a subsequent meeting at which time the remainder of the access agreements would be worked out.[13] These discussions were intended to lead to a written access agreement; however, no such agreement was reached prior to the UFW's attempt to take access on November 26, 1977.

On November 26, 1977, Washburn and several of the UFW representatives drove to the Ranch at 4:30 p.m.[14] The intent of the UFW organizers was to obtain access to the Ranch and speak with petitioner's employees who stopped work at 3:00 p.m. that day.[15] Washburn also testified that the purpose of their visit was to attempt to talk with employees that he believed lived one and one-half miles from the vehicular gate off Wilshire Road.[16]

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[11] R.T., Vol. III, p. 65, l.23-p. 67, l.1.

[12] R.T., Vol. III, p. 67, l.4-11.

[13] R.T., Vol. III, p. 67, l.12-17.

[14] R.T., Vol. I, p. 16, l.11-p. 17, l.12.

[15] G.C. Exhs. "7" and "8."

[16] R.T., Vol. I, p. 61, l.1-8.

The point at which Washburn and his fellow organizers considered entering the Ranch is a vehicular gate a few hundred yards north of the end of Wilshire Road. A single chain approximately eighteen inches off the ground prevents vehicles from entering the Ranch at this point. No obstructions were present, nor have obstructions ever been present, that would prevent any individual from walking onto the Ranch.[17] All points on the Ranch can be reached by a walk of fifteen minutes or less from the Wilshire Road vehicular access, and most points on the Ranch can be walked to in less than five minutes. Washburn acknowledged that he could have merely stepped over the chain and walked onto the property.[18] Inded, Washburn considered whether he and his fellow organizers would walk onto the Ranch; instead they decided to proceed to petitioner's business office.[19]

Washburn and the UFW organizers accompanying him arrived at petitioner's office at approximately 4:15 p.m. that same afternoon.[20] Washburn demanded that the UFW be given keys to the chain across the Wilshire vehicular entrance or that Harry Nagata go to the vehicular entrance and unlock it so that the organizers could enter the Ranch in their vehicle. Harry Nagata responded that it was more than one hour after petitioner's crews had ceased working. Washburn acknowledged this fact but asserted that the UFW was entitled to drive onto the Ranch at any time of the day or night because of the UFW's belief there were workers living in, on, or near the Ranch. Harry Nagata answered that he did not maintain a labor camp and that he knew of no employees then living on the Ranch.[21] Nonetheless, Harry Nagata further responded that he would check with his attorneys to determine whether Washburn's legal position was correct. Harry Nagata at-

[17] R.T., Vol. I, p. 58, 11.6-18.
[18] R.T., Vol. I, p. 57, 1.24-p. 58, 1.18.
[19] R.T., Vol. I, p. 58, 11.19-25.
[20] R.T., Vol. IV, p. 21, 11.2-8.
[21] R.T., Vol. I, p. 20, 11.1-17; Vol. II, p. 131, 1.13-p. 132, 1.8.



tempted to contact his lawyer, but at 5:00 p.m. on a Saturday night was unable to do so.[22] Washburn and the other UFW organizers left without being given a key to the Wilshire vehicular entrance, and they did not make any further attempts to walk onto the Ranch on that Saturday. Since that Saturday, the UFW has never attempted to take access to any fields farmed by petitioner either one hour before work, during the lunch break, one hour after work or at any other time.

The Administrative Law Officer found that there had been no violation of regulation access as required by the California Administrative Code.[23] Nonetheless, she concluded that petitioner's denial of vehicular access on November 26, 1977 constituted an unfair labor practice. Specifically she found that petitioner had denied UFW organizers vehicular access to workers' homes, thereby denying what she found to be a constitutional right of access guaranteed by the First Amendment of the United States Constitution.[24]

The evidence upon which the Administrative Law Officer found that employees lived on the Ranch established that persons might be living in the area of the Ranch but did not identify whether the persons were employees of petitioner, unemployed, or workers for the Ranch. Most of the testimony at the hearing was that in previous years, although no persons were actually seen living upon the Ranch, witnesses had noticed garbage and temporary tent-like structures.[25] In fact, Washburn, the leader of the UFW representatives seeking access on November 26, 1977 expressly stated that he had not seen any evidence of any persons living on the Ranch in 1977.[26] Assuming there were persons living on or near petitioner's Ranch, these persons were there without permission. Petitioner

[22] R.T., Vol. I, p. 20, 1.1-p. 21, 1.9; Vol. III, p. 22, 11.1-20.
[23] Administrative Law Officer's Decision, p. 12.
[24] Administrative Law Officer's Decision, pp. 16-22.
[25] R.T., Vol. II, p. 69, 11.7-9; R.T., Vol. II, p. 110, 11.8-10.
[26] R.T., Vol. I, p. 62, 1.14-p. 63, 1.4.

discouraged persons from living on the Ranch, and physically removed any materials found on the Ranch that might conceivably be used as housing.[27]

Nonetheless, the Administrative Law Officer found that petitioner had denied UFW organizers their constitutional right of access to the Wilshire Ranch on November 26, 1977. On May 23, 1979, the ALRB affirmed the rulings, findings and conclusions of the Administrative Law Officer and adopted a modified form of her recommended order. Petitioner petitioned for review of the Board's decision and order with the California Court of Appeal, Fourth Appellate District, Division One, within thirty days from the date of issuance of the Board's order. Briefs were filed shortly thereafter, with petitioner's reply brief being filed November 15, 1979. One day later, November 16, 1979, the Court of Appeal summarily denied the petition for review: "The petition for review of an order of the Agricultural Labor Relations Board is denied." Petitioner then filed a petition for hearing with the California Supreme Court. This request was summarily denied by a postcard stamped "Hearing Denied" on December 13, 1979.

## REASONS FOR GRANTING THE WRIT

### I. First Question Presented.

This case involves a peculiar blend of the access doctrine espoused in *National Labor Rel. Bd.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and its progeny.

In *Babcock* this Court held that if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union access to communicate with them, the employer must allow the union to approach his employees on his property. 351 U.S. at 113. The employer's right to exclude persons from his property was required to yield

[27] R.T., Vol. III, p. 127, 11.12-14.



only to the extent needed to permit communication of information on the right to organize. Petitioner in this case accommodated the union's right to access in this regard by permitting union organizers to come onto its property before work, during lunch breaks, and after work.

The union now claims that both it and employees allegedly living on petitioner's property have an additional First Amendment right which requires the employer to give the union unrestricted vehicular access to these employees.

The Agricultural Labor Relations Board upheld this constitutional right to access to these employees based primarily on the California Supreme Court decision in *United Farm Workers of America* v. *Superior Court*, 14 Cal.3d 902 (1975), in which the court indicated that a First Amendment right to access would apply to labor camps.[28] The basis of this First Amendment privilege can be traced to *Marsh* v. *Alabama*, *supra*, and other "company town" decisions.[29]

Even if the analogy between labor camps and company towns is appropriate, it cannot be properly applied to the facts in this case. This Court has long recognized that before an owner of private property can be subjected to the commands of

[28] The *United Farm Workers* decision is dicta to the extent it discusses a First Amendment Right of access to migrant labor camps. The court states "We are not required to resolve . . . the thorny problem of whether the injunction here in issue is itself justified, i.e., whether its substance comports with the requirements of the First Amendment. We determine only whether the challenged ex parte order affects, or in the words of *Carroll*, is in the area of activity protected by the First Amendment." 14 Cal.3d at 911. *See also*, *Note, The Supreme Court of California 1974-1975*, 64 Calif. L. Rev. 239, 373-74 n23.

[29] The *United Farm Workers* decision cites to certain federal cases and joins in their reading of the First Amendment. 14 Cal.3d at 910. These federal cases focus on *Marsh* v. *Alabama*, and other "company town" cases. *E.g.*, *Petersen* v. *Talisman Sugar Corporation*, 478 F.2d 73, 80-81 (5th Cir. 1973).

the First and Fourteenth Amendments, the privately owned property must assume to some significant degree the functional attributes of public property. *Central Hardware Co.* v. *N.L.R.B.*, 407 U.S. 539 (1972). Where, as here, the employer has not consented to employees residing on his property, and has taken steps to prevent persons from doing so, no state action exists.

Even if state action existed, the First Amendment does not operate in a vacuum requiring unrestrained access. The United States Court of Appeal for the Fifth District has indicated that even though a labor camp's residents and their visitors have a constitutional right of access, property owners can nonetheless impose reasonable restrictions designed to prevent unnecessary interference with their business. *Petersen* v. *Talisman Sugar Corporation*, 478 F.2d 73 (5th Cir. 1973). Petitioner was, and is, willing to permit vehicular access upon notice, and has never interfered with access by foot. The UFW has asserted, and the Board's order grants the UFW, a right to drive upon petitioner's property at will unrestricted by petitioner in any way.

A ruling on this question is necessary to preserve the delicate balance struck by this Court between First Amendment rights of employees and private property rights of employers.

### II. Second Question Presented.

Petitioner was unable to obtain meaningful judicial review under the California procedure for review of Agricultural Labor Relations Board decisions. California Labor Code Section 1160.8 provides that persons aggrieved by the final order of the ALRB "may obtain a review of such order in the Court of Appeal . . . by filing in such court a written petition requesting that the order of the Board be modified or set aside."

The California Supreme Court has recently determined that judicial review of ALRB decisions is akin to a petition for writ of review or mandamus and therefore petitions for review



may be summarily denied, without statement of reasons, "on the face of the petition and any memorandum opposing it." *Tex-Cal Management, Inc.* v. *Agricultural Labor Relations Board*, 24 Cal.3d 335, 350 (1979). The *Tex-Cal* opinion also suggests that the court has discretion to deny a petition for review without full consideration of the merits.[30] Petitioner's petition for review in the California Court of Appeal was accorded this summary treatment: it was denied one day after petitioner's reply brief was filed. Petitioner's petition for hearing filed with the California Supreme Court was also summarily denied.

A fundamental principle in administrative law is that access to judicial review of agency decisions must be provided absent persuasive or clear and convincing evidence of a contrary legislative intent. *Morris* v. *Gressette*, 432 U.S. 491 (1977); *Abbot Laboratories* v. *Gardner*, 387 U.S. 136 (1967). Although "access" to judicial review is technically provided under the California Labor Code and the *Tex-Cal* opinion, the type of review under *Tex-Cal* is perfunctory at best and nonexistent as a practical matter in this case. Clearly due process requires more than a summary denial the day after briefs are filed.

By way of contrast, review from National Labor Relations Board orders is commenced by filing a petition for review in the Court of Appeal. Once the petitioner files the record, the parties file briefs, present oral argument in many cases and receive a decision on the merits from the court. Federal Rules of Appellate Procedure 20. *See also Tex-Cal Land Management, Inc.* v. *Agricultural Labor Relations Board*, 24 Cal.3d at 348.

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[30] "The absence from the federal scheme of judicial discretion to deny a petition for review without full consideration of the merits suggests the possibility that section 1160.8 review also is a matter of right. . . ." *Tex-Cal Land Management, Inc.* v. *Agricultural Labor Relations Board*, 24 Cal.3d 335, 348-49 (1979). The court in *Tex-Cal* later concludes that section 1160.8 does not so provide.

The extent of judicial review required of administrative agency decisions is not clear. However, the purpose of such judicial review is to insure that the petitioning party has been accorded due process in the administrative proceedings. *Lewes Dairy, Inc.* v. *Freeman*, 401 F.2d 308, 317 (3d Cir.), *cert. denied* 394 U.S. 929 (1969). Further, judicial review should be undertaken with careful and deliberate scrutiny of an agency's decisions to insure compliance with law and legislative mandate. *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-16 (1971); *Office of Communication of United Church of Christ* v. *F.C.C.*, 465 F.2d 519 (D.C. Cir. 1972). Petitioner contends that the California procedure for review of ALRB decisions fails to provide this assurance.

A ruling on this question is necessary to insure that meaningful judicial review of Agricultural Labor Relations Board determinations is available.



## CONCLUSION

This Court has never determined that the First Amendment requires an employer to grant unfettered access to his private property to union organizers. The decision of the Agricultural Labor Relations Board in California grants this unfettered access so long as the union can establish minimal evidence that persons who may be employees may be living on or near the employer's property. This decision is clearly in conflict with the established parameters of First Amendment rights accorded in both the labor organization context and in the "company town" context. The refusal of the California Supreme Court to review the ALRB decision was clearly in error. Additionally, the California procedure for review of Agricultural Labor Relations Board decisions fails to accord a meaningful judicial review of agency determinations. For both these reasons petitioner requests that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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## APPENDICES TO

## PETITION FOR A WRIT OF CERTIORARI

## TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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**APPENDIX A**

Unreported Decision and Order of the Administrative Law Officer, State of California. Nos. 77-CE-25-X; 77-CE-25-A-X; 77-CE-34-X; 77-CE-37-X. Filed May 9, 1978.

**APPENDIX B**

Reported Decision and Order of the Agricultural Labor Relations Board, 5 ALRB No. 39 (1979). Filed May 23, 1979.

**APPENDIX C**

File Stamped Cover Sheet of Petition for Review with the California Court of Appeal.

**APPENDIX D**

Order from Court of Appeal Denying Petition for Review. Filed November 16, 1979.

**APPENDIX E**

File Stamped Cover Sheet of Petition for Hearing in the California Supreme Court. Filed November 26, 1979.

**APPENDIX F**

Order from California Supreme Court Denying Petition for Hearing. Filed December 13, 1979.

# APPENDIX A

**STATE OF CALIFORNIA**

**BEFORE THE**
**AGRICULTURAL LABOR RELATIONS BOARD**

| | |
|---|---|
| In the Matter of:<br>NAGATA BROTHERS FARMS, INC.,<br>*Respondent,*<br>and<br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br>*Charging Party.* | **CASE NOS. 77-CE-25-X, 77-CE-25-A-X, 77-CE-34-X, 77-CE-37-X** |

Agricultural Labor Relations Board,
by *Pat Zaharopoulos,* Esq., of
San Diego, for the General Counsel

Gray, Cary, Ames & Frye,
by *James K. Smith,* Esq., of
San Diego, for Respondents

Feist, Vetter, Knauf & Loy
by *Norman L. Vetter,* Esq.,
of Oceanside, for Respondents

United Farm Workers of America,
AFL-CIO, by *Michael Heumann,*
of San Ysidro, for the
Charging Party

## DECISION

### Statement of the Case

BEVERLY AXELROD, Administrative Law Officer: These cases were heard before me in San Diego, California on April 4, 5, 6 and 7, 1978. The Order consolidating cases issued on March 3, 1978. The complaint alleges violations of Section 1153(a) of the Agricultural Labor Relations Act, herein called Act, by Nagata Bros. Farms, Inc., herein called Respondent. The complaint is based on charges filed on November 29, 1977, January 12, 1978, December 12, 1977, and December 14, 1977 by United Farm Workers of America, AFL-CIO, herein called the Union. Copies of the charges were duly served upon Respondent. Respondent filed its answer denying violations of Section 1153(a) of the Act.

All parties were given full opportunity to participate in the hearing, and after the close thereof the General Counsel, the Union and the Respondent each filed a brief in support of its respective position.

During the hearing the complaint was amended to change the date in paragraph 10(a) and paragraph B(3) of the prayer to November 26, 1977, and to change the names in paragraphs 6 and 10(c) from Manuel Cos or Cas to Manuel Coss, and from Norm Vetter to Ivan Allen.

Case number 77-CE-37-X was dismissed for lack of evidence on motion of the General Counsel. The Union's motion to intervene was granted without objection.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:



### Findings of Fact

#### I. Jurisdiction

Respondent is a California corporation licensed to do business in the State of California, and is an agricultural employer within the meaning of Section 1140(c) of the Act.

The Union is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

#### II. The Alleged Unfair Labor Practices

The complaint alleges the Respondent violated Section 1153(a) of the Act by denying Union organizers access to its premises where workers live or sleep, by denying Union organizers vehicular access to its premises during an access period, and by preventing its employees from organizing fellow employees.

Respondent denies that workers live on its premises, denies that vehicular access is required or necessary during access periods, and denies preventing its employees from organizing fellow employees in any significant degree.

##### A. *The Operation of the Ranch*

1. **The Site:** Respondent operates three ranches producing strawberries and tomatoes. The alleged violations occurred at one of them, referred to as "Wilshire Ranch" or "La Montana," located at the end of Wilshire Road in northern San Diego County. Respondent's farming operation at Wilshire Ranch occurs on four parcels of land, each parcel being a square with sides one-quarter mile long. Three of these parcels extend from north to south, and the fourth is immediately east, so that all four form an "L." The northernmost parcel is owned individually by Harry Nagata, one of Respondent's officers; the parcel just to the south is owned individually by George Nagata, also an officer of Respondent. The southwest parcel is owned by one Arnie Raskin, and the southeast parcel is owned by George

and Harry Nagata as a partnership. Harry Nagata's home is in the southeastern parcel. Respondent's witnesses assert that it leases only those areas in these four parcels that it farms.

There is an entrance on the southwestern parcel, at the end of Wilshire Road. This is the only entrance that is primarily used for the farming operations.

In 1975, Respondent installed a cable across the road at this entrance, and it is kept locked. It prevents entry into the ranch by vehicles, but does not bar entry on foot.

Respondent has provided keys to the three Nagata brothers, to its foremen, to the Immigration and Naturalization Service, to the Oceanside Police Department, to the Texas Company (for delivery of gasoline), and to the Williams Energy Company (for delivery of propane for the cooking stove). It also allows the Camerina Catering Co. to have its own lock, for unsupervised entry of their food catering wagons. Respondent has verbal agreements with the latter as to times of entry and manner of behaving while on the property. Other suppliers making deliveries of items such as irrigation pipes (which sometimes come every other day) or containers are escorted on and off the property.

Vehicular entry to Wilshire Ranch at a place other than the gate at the foot of Wilshire Road is precluded by fencing, ditches, the contour of the land, and a gate near the home of Harry Nagata.

2. **The Work Force:** Respondent's work force ranges from a peak in May of about 250 workers to a low in January of about 50. The payroll records for the last two weeks in November 1977 (General Counsel Exhibit 5) show a total of about 220 workers. About 24 of these workers are referred to as "commuters," who come to work mostly from the Tijuana-San Ysidro area. They travel to and from work in two vans, and receive a ride allowance in addition to their pay. Employees Cantu and Urqueza, the drivers of the two vans, receive a gas allowance in addition to their ride allowance and pay.



The commuters and a dozen or so other workers are listed on the payroll records as belonging to "Group I." Supervisory personnel are also listed under "Group I." All employees in Group I received at least $2.90 per hour.

The balance of nearly 200 workers are listed as "Group II," and were paid $2.50 per hour.

The commuters are all field workers. They work in separate crews from the "local" field workers, and refer to the latter as "illegals" or "wetbacks." One reason they are called "illegals" is that they run away whenever an Immigration Officer appears, thus suggesting that they are undocumented aliens.

George Nagata and Harry Nagata are representatives of Respondent. Manual Coss and Luis Boado are employed by Respondent as supervisors.

**B.** ***Workers Living on the Ranch***

Harry Nagata testified that the "locals" are workers who live in the area of Respondent's farming operation, in the vicinity of Oceanside-San Luis Rey. Respondent's address list (General Counsel Exhibit 4) gives the mailing address for 196 of its workers as "P.O. Box 218, San Luis Rey, Calif. 92068," which is the same as Respondent's mailing address. Both Harry Nagata and George Nagata testified that they have no direct knowledge that anyone lives on the Wilshire Ranch. George Nagata admits he has seen evidence of persons living there, and that he "presumes" they do, although he doesn't go out in the field after working hours. Harry Nagata, who lives on the property, states he has seen fires there at night. George Nagata said he received many complaints from an adjacent landowner regarding people living on the property next to his fence. As a result, about two weeks prior to this hearing, Respondent's equipment and personnel were used to clear the brush in the areas where the people "tend to gather." A similar clearing of brush was undertaken by Respondent twice in 1977.

Under cross-examination by General Counsel, George Nagata testified as follows:

Q You testified that you bulldozed a certain area after they had complained; is that correct?

A Yes.

Q And you said you tried to discourage people from living on the property; is that correct?

A Yes.

Q Could you explain what action, if any, you took to discourage them from living there?

A We tore those plastic tents and if we encounter any physical evidence of anyone living there we would either bury it or destroy it.

Q Did you do anything else?

A I can't think of anything else.

*Official Transcript*
Vol. IV, p.5, lines 1-13

Tim Foote, Field Examiner for the Agricultural Labor Relations Board, visited the property on December 5, 1977, accompanied by George Nagata and his attorney, Norman Vetter. Mr. Foote was told by some workers, in Spanish, that they lived in a row between the vines, and Mr. Foote translated this to Mr. Vetter. Foote also saw burnt-out campfires and debris from food containers.

U.S. Border Patrol Agent Alvin Ray Francis testified that it is not uncommon for illegal aliens to live outdoors in caves, boxes, and plastic tents in tomato rows and the like, and that he has seen many such makeshift living quarters on the Wilshire Ranch, probably in early 1977. He did not see evidence of recent living on the ranch when he was there about noon in December 1977. On that occasion he said, "We was in plain clothes, we just got out of court, and we was just driving around to see what agriculture was going on." *Official Transcript* Vol. III, p. 51, lines 6, 7.



A large propane cook stove is kept at Wilshire Ranch. It is used by the workers at lunch time. Officer Francis has in the past apprehended aliens while they were cooking dinner and breakfast on that stove.

Scott Washburn, a Union organizer, also saw plastic tents and boxes being used as dwellings in and around the fields when he visited the ranch in 1975. He has not been on the Wilshire Ranch since then, but in 1978, about three or four weeks prior to this hearing, he observed the property from an elevated area alongside a fence at the end of Wilshire Road. It was about one p.m. on a Saturday, and he saw about 100 workers. Some of them were playing soccer, some were walking in the fields, and 40 to 50 were gathered around junk dealers in a station wagon just outside the gate. The junk dealers were selling items such as radios, batteries and used clothes.

Three commuter workers observed plastic tents, caves and box dwellings in and around the fields and canyons of the Wilshire Ranch in 1977. One witness said the caves cannot be seen in daylight without being very near, because they are covered. Another said he has always seen such dwellings at the ranch, but not in large numbers in November and December of 1977. Witnesses have seen clothes, food, blankets and household items in and around these dwellings, and have seen campfire sites and laundry drying nearby.

A catering truck comes to the ranch from 11 a.m. to noon, and again from 4 p.m. to 5:30 p.m. The commuters never buy anything from the caterers in the latter period, but they have observed the "illegals" buying food which requires cooking and household items.

The commuter workers have never seen the others arrive at the ranch. They are always there when the commuters arrive at 6 to 7 a.m., and they always stay at the ranch when the commuters leave. Nor have they ever seen cars regularly parked in the parking area other than the two in which they themselves travel and those used by the foremen. There is no public transportation to the area.

C. *Attempted Access by the Union*

On November 23, 1977, Respondent's attorney Norman Vetter and Union representative Scott Washburn were among those present at a meeting with the Regional Director of the Agricultural Labor Relations Board for the purpose of attempting to work out an access agreement. One matter discussed was the time of day that Respondent's crews finished work. Mr. Vetter remembers it as 3 or 3:30 p.m. Mr. Washburn was not sure, but thought it was about 4 p.m. There was discussion about the mechanics of access prior to work and at the lunch hour, but the meeting adjourned before any meaningful discussion of access after work, and no final agreement was reached.

On November 25, 1977, the Regional Director met briefly with George and Harry Nagata, and expressed optimism that an agreement would be worked out between Respondent and the Union, and he would try to schedule another meeting as soon as possible.

On November 26, 1977, a group of Union organizers arrived at the Wilshire Ranch gate at 4:30 p.m. The locked gate prevented them from driving in. They thereafter went to Respondent's office, arriving at about 4:45 p.m. or 4:50 p.m. At the office, Union organizer Scott Washburn asked George Nagata to admit them to the ranch. Nagata refused, stating that Respondent's crews had quit work more than one hour ago. Washburn then stated that they wanted to enter to talk to the workers living there. Nagata said he would have to call his laywers; he attempted to do so, but could not reach them. He refused to arrange for the organizers' admittance at that time and they left.

Most of the workers started work at 6:30 a.m. on November 26, took a half-hour lunch break, and quit at 3 p.m., making an eight-hour work day. The payroll records for that day (General Counsel Exhibits 5, 6 and 7) show about 14 workers who put in from nine to ten hours on that day, and one worker



put in ten and one-half hours. There was no testimony to show whether the time in excess of eight hours was before or after the time worked by the others. George Nagata testified that irrigators generally began earlier, at 5 or 5:30 a.m., and that those who worked ten hours were probably irrigators.

D. *Attempted Organizing by Respondent's Employees*

On November 22, 1977, Union representative Scott Washburn served a Notice of Intent to Obtain Access on Respondent by delivering the Notice to Respondent's business office. A conversation then took place among Scott Washburn and George and Harry Nagata concerning the identifying of Union organizers. Washburn states that he told them the organizers would be wearing a button similar to General Counsel Exhibit 10. George Nagata states he thought the button had a photograph of the bearer on it.

On December 12, 1977, the commuter workers stayed after the 3 p.m. quitting time and went to talk to the "illegals" about the Union, and to give them literature. The foreman called George Nagata about the situation, and Mr. Nagata came to the area, arriving about 3:30 p.m. He told the commuter workers they could not stay, because they did not have the proper Union button identifying them as Union organizers. The commuters then left.

The next day, December 13, 1977, George Nagata, after consulting with his lawyers, notified his foreman to allow the commuters to stay one hour after work to talk to the others and distribute literature. After work, the commuters walked toward the water pump where about 80 "illegals" had gathered. One of Respondent's foremen then picked up most of the "illegals" in a large truck, and drove them to another area of the ranch. About 18 or 20 remained, and the commuter workers talked with them until the end of the hour.

**E. *Discussion of Issues and Conclusion***

1. **Regulation Access:** The Union, having duly filed and served its Notice of Intent to Obtain Access, was entitled, on November 26, 1977, to have its organizers enter Respondent's property for one hour after completion of work, to talk to employees in areas where they congregate. 8 Cal. Admin. Code Section 20900(e)(3)(A). On that day, the attempt by the organizers to enter began at 4:30 p.m. However, there was nothing in the testimony or in the exhibits in evidence to show that any employee worked later than 3 p.m. on that day. General Counsel and the Union argue that since some employees worked longer than eight hours, they must necessarily have been working later than 3:30 p.m. I cannot agree.

There was no persuasive evidence to indicate, one way or the other, whether those workers put in the extra hours before 6:30 a.m. or after 3 p.m. Therefore, denial by Respondent of regulation access under that Code section at 4:30 p.m. on November 26, 1977 was not improper.

2. **Access to Workers' Homes:** The attempted entry on November 26, 1977 was not only to talk to workers at the end of the work day, but also to visit and talk to them where they lived.

A different standard applies with respect to the organizers' attempt to visit workers who may have been living on the ranch. The Board has repeatedly held that farmworkers have the right to be contacted by, and to receive communications from, organizers at their homes, and that such communications are not only legitimate but crucial to the proper functioning of the Act. *Silver Creek Packing Company,* 3 A.L.R.B. No. 13 (1977); *Henry Moreno,* 3 A.L.R.B. No. 40 (1977); *Merzoian Brothers Farm Management Co., Inc.,* 3 A.L.R.B. No. 68 (1977); *Whitney Farms,* 3 A.L.R.B. No. 68 (1977); *Anderson Farms Co.,* 3 A.L.R.B. No. 67 (1977).



It is clear from the evidence that workers live on the ranch. Many witnesses described the crude dwellings which they inhabit: caves, hollowed out boxes, plastic tents. Witnesses also testified that they saw clothing, food, laundry hanging, garbage, and other indicia of habitation. The workers were observed buying food that requires cooking and household articles at the end of the day. They were observed playing games and walking around in the fields when the commuters went home. No one saw them arrive or leave, nor was there any evidence of transportation to enable them to do so. The conclusion is inescapable that they lived there.

The Respondent argues that the evidence presented did not concern itself, in most cases, with the months of November and December, 1977. I find this not persuasive. The testimony covered periods from 1975 to 1978, and most of it dealt with the year 1977 in general. It would be fanciful to believe that it did not exist for the period in question.

Respondent further argues that the evidence did not identify whether the persons were employees of Respondent, unemployed, or workers for other ranches. This is not substantiated. It was clear from the testimony that the witnesses recognized the workers who stayed at the ranch as employees of Respondent, even though they did not know them by name.

It is not credible that Respondent was unaware of the fact that workers lived on its property. It allowed these workers to stay there even when it ordered the commuters to leave on December 12 and 13, 1977. On December 13, one of its foremen drove workers *into* the ranch, not out of it, at the end of the work day. It allowed the canteen wagon to enter its property at the end of the work day, when those who live elsewhere had left. It allowed a large cooking stove to be available in the early morning and evening hours. It provided no address other than its own for these workers. It is not credible that its own foremen and supervisors have not seen the makeshift dwellings that other witnesses have seen. Harry

Nagata admitted seeing campfires at night, and George Nagata "presumes" that workers live there. It has received many complaints from an adjoining landowner which put it on notice that workers lived there. On December 5, 1977, an employee told Board agent Foote that they lived in the fields, and Mr. Foote translated this into English for Respondent's attorney Norman Vetter, who was present with him during that conversation. Nor is it credible that Respondent has taken any meaningful action to prevent its workers from living on its property. On the contrary, it encourages them to do so by providing them access to the facilities listed above. Although Respondent has on several occasions "bulldozed" some of the brush where habitations exist, this was a gesture to placate a neighbor rather than a meaningful attempt to terminate residence on the property. It must have been aware that the crude shelters were all too easy to duplicate.

The Union, in its post-hearing brief, argues, ". . . Nagata Brothers condones the living of the illegals on its property. Nagata Brothers tries to keep their presence as low-profile as possible, but it is economically dependent on having them live there. They provide a cheap source of labor. Unless the illegals can live at the ranch, this cheap source of labor is unavailable."

A footnote in General Counsel's post-hearing brief states, "Federal law allows employment of undocumented aliens (commonly referred to as illegals) yet makes harboring a felony. Thus it condones using their labor while outlawing giving 'simple shelter.' "

The above statements are not evidence, but they do provide some insight into the problems involved in the situation.

Respondent argues that it leases only those areas in the Wilshire Ranch that it actually farms, implying that the dwellings which are not actually in the fields are not on Respondent's property. Its gates and fences enclose the entire area.



Keys to the gate are in the possession of Respondent and those to whom Respondent gives them, and even the owner of the parcel in the southwest corner does not have a key. Respondent used its personnel and equipment to bulldoze areas that were not farmed. Whether or not its leases are restricted, Respondent certainly controls all of the property within the boundaries as shown in General Counsel Exhibits 2 and 3.

It is not necessary to determine whether the living situation of Respondent's employees constitutes a "labor camp," nor is it necessary to determine whether or not Respondent is a "landlord" with respect to those employees who live on the property. It is sufficient to establish that workers live on the property, and that Respondent has control, for the constitutional access rights to attach, and I so find. The farmworkers who live on the Wilshire Ranch have the same First Amendment rights as farmworkers who live in formal labor camps, or who rent from landlords in a more conventional setting. To hold otherwise would mean that those workers who, for whatever reason, exist in the most substandard conditions must thereby be denied the fundamental rights to have visitors and to ordinary communication.

Access to employees' homes is constitutionally required by the First Amendment: *United Farm Workers* v. *Superior Court (Buak Fruit)*, 14 Cal.3d 902 (1975). It is not the right of an employee's employer, supervisor, labor contractor or landlord to prevent communication with union organizers; this "right of home access flows directly from Section 1152 and does not depend in any way on the 'access rule' contained in our regulations, which only concerns access at the work place," *Vista Verde Farms*, 3 A.L.R.B. No. 91 (1977).

Respondent argues that even if there were a labor camp at Wilshire Ranch, the Union's access must be limited. In *Merzoian Bros. Farm Management Co.*, 3 A.L.R.B. No. 62 (1977), the record showed that the gates of a labor camp were shut and locked at night, and only a supervisor and his

assistants had keys. The Board held, "Distributing keys only to the supervisor and his assistant not only permits the employer to restrict at its pleasure when union organizers can enter the premises, but reduces the resident to the status of a prisoner, locked behind barbed wire topped fences, unable to leave or have visitors without permission of the supervisor.

"The right of employees who are residents of a labor camp to receive visitors is akin to the rights of a person in his own home or apartment. The owner or operator of a labor camp cannot exercise for the worker his right not to receive visits from union organizers. Unlike our dissenting colleague, we recognize that accommodation must be made for the rights of not just the owner and the organizer, but also for the tenant who has a basic right to control his own home life. It is our duty to balance these rights and a heavy burden will lie with the owner or operator of a camp to show thay any rule restricting access does not also restrict the rights of the tenant to be visited or have visitors."

In *Anderson Farms Company,* 3 A.L.R.B. No. 67 (1977), the Board refused to limit labor camp access by restricting such access to the hours of 2:30 to 8:30 p.m. Citing *Merzoian Brothers, supra, Isamu Minami et al.,* 3 A.L.R.B. No. 81 (1977) held, "Interfering with contact between a union and employees at the employees' home by posting guards at the entrance to labor camps or promulgating rules controlling the times of such contact is clearly a violation of Section 1153(a)."

3. **Access by Vehicle:** Having determined that access to the employees' homes is required, it is now necessary to examine the facts to determine whether access was in fact denied by Respondent.

It is uncontroverted that the barrier at the Wilshire Road gate barred vehicles, not pedestrians. Respondent argues that the furthest point from the gate is between one-half and three-fourths of a mile, and that any point on the ranch could be



reached by a walk of 15 minutes or less. It also argues that organizers sought to visit workers living "one and a half miles away," and that since this distance was beyond Respondent's boundaries, it was not required to give the organizers access.

I do not agree. The evidence indicated that workers lived in a variety of locations on the ranch, and it is likely that these locations were frequently changed. The organizers intended to visit more than one worker, and there is no way of knowing how many miles of travel might be required in going back and forth among the homes of various employees. Furthermore, it is not the distance that is crucial, but the customary mode of travel within the ranch. "Their visitors are entitled to use the customary ways and roads giving ingress and egress to the employees' place of abode." *Lake Superior Lumber Corp.,* 70 N.L.R.B. 178, 197, 18 L.R.R.M. 1345 (1946), enf. 167 F.2d 147 (6th Cir. 1948). It would follow that the roads may be used in the customary manner—in this case, by vehicle.

There was no evidence to show that anyone traveled around the ranch on foot, except Border Patrol agent Francis. He usually drives around the ranch, and has a key to the gate, but he had sometimes walked in at night so that the aliens wouldn't see him coming.

The workers are driven from place to place on the ranch. The various commercial firms drive in. The supervisors and foremen drive, rather than walk within the ranch. When visitors are taken on a tour, a vehicle is used. Even were we to assume that all employees' visitors had the time and physical ability to walk the distances involved, they should not be forced to travel in a manner different from that generally used. Effective access requires that organizers be enabled to use the customary means of travel available to visitors and business invitees of the ranch.

Failure to allow vehicular access to the Union would be discriminatory, and constitute interference with employee rights of self-organization in violation of Section 1153(a) of the Act. See *Hoerner Waldorf Corp.,* 227 N.L.R.B. No. 94, 94 L.R.R.M.

1613, 1614-15 (1976) *re* disparate enforcement of rules. The National Labor Relations Board holds that solicitation by a labor organization may be restricted no more than solicitation by other organizations. *State Chemical Co.*, 65 L.R.R.M. 1612 (1967); *Montgomery Ward& Co.*, 80 L.R.R.M. 1814 (1967).

Lastly, Respondent argues that on November 26, 1977, there was no denial of access, because Harry Nagata asserted he would have to contact his attorneys before he could respond. This position has no merit: it merely points out a reason for Respondent's refusal of access on that day. It was not a verbal response that was required, but actual access to the ranch and this was not given.

For all of the foregoing reasons, I find that Respondent's denial of vehicular entry to the Wilshire Ranch on November 26, 1977, constituted unlawful interference with the free exercise of rights guaranteed to employees by the Act, in violation of Section 1153(a).

4. **Organizing by Employees:** Respondent admits that it asked certain of its employees to leave after work on December 12, 1977, when they tried to talk to other workers about union organization. It attempts to justify this on the basis that its agent George Nagata honestly believed they could not stay because they were not wearing the badges he understood were worn by official Union organizers. This argument is untenable for several reasons.

First, good faith is not an element where interference with employees' protected activity is concerned. *N.L.R.B.* v. *Corning Works*, 293 F.2d 784, 48 L.R.R.M. 2759, 2760 (1st Cir. 1961); *N.L.R.B.* v. *McCatron*, 216 F.2d 212, 35 L.R.R.M. 2012, 2014 (9th Cir. 1954) *cert. den.*, 348 U.S. 943, 35 L.R.R.M. 2461 (1955). Furthermore, even though George Nagata mistakenly believed a Union badge containing the bearer's photograph was required to identify Union organizers, he cannot credibly be expected to have failed to recognize the identity of Respondent's own employees.



Respondent further argues that any violation which arose from requiring certain employees to leave after work on December 12 was an isolated incident, because it allowed them to stay for one hour on the following day. While this position might have merit if it referred to non-employee organizers, it is inapplicable to requirements concerning its own employees. It is unlawful to limit known or suspected union-adherent employees from staying on the premises over one hour while allowing other employees to do so. See *Floride Steel Corp.*, 224 N.L.R.B. 45, 49 (1976). On both December 12 and December 13, Respondent applied different standards to pro-Union employees than to other employees, and such discrimination is clearly an interference with the rights of employees as guaranteed under Section 1152 of the Act.

Respondent asserts that a review of the Board's access regulation gives considerable merit to George Nagata's conclusion that only United Farm Worker organizers are entitled to access. I cannot agree. Respondent states in its post-hearing brief that the regulations do not refer to employees, but only to Union organizers.

Respondent also implies that no harm was done because the literature which the employees wished to distribute was already posted at the ranch, and there was no evidence to suggest that one hour after work was not ample time for the activities of pro-Union workers. This argument is particularly repugnant to the stated purposes of the Act, since it assumes that Respondent may limit organizing activities, depending on the substantive content of the organizers' activities. It may not do this for either non-employee nor employee organizers.

Pro-Union employees may stay at the work place during non-working hours as long as other employees are allowed to do so. Furthermore, employees who live on the property may receive pro-Union employees as visitors in the same manner as they may receive other visitors, as discussed earlier.

For all of the foregoing reasons, I find that Respondent's refusal to allow certain of its employees to remain after work on December 12, 1977 constituted unlawful interference with the free exercise of rights guaranteed to employees by the Act, in violation of Section 1153(a).

**III. The Remedy**

Having found that the Respondent is engaged in certain unfair labor practices within the meaning of Section 1153(a) of the Act, I recommend that the Respondent be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

In its brief, Respondent notes that only two events allegedly violated any provision of the Act; the implication is that any infringement on the rights of its employees is minimal. I cannot agree. There is nothing in the record to indicate that Respondent has changed its policy in any material respect. I must presume that the gate at Wilshire Road is still locked, that pro-Union employees are still restricted in the times they are allowed to remain talking to other employees, and that the workers who live on the ranch are restricted in their rights to receive visitors.

The exercise of improper authority by Respondent on December 12, 1977, followed by continuing illegal restrictions thereafter, cannot help but intimidate the workers in the exercise of their fundamental right to communicate with each other. This is particularly true with respect to those employees who work and live on Respondent's property. Theirs is a fragile freedom, and strong measures are required to ensure coercion-free communication.

The testimony indicates that large numbers, if not all, of the workers who live on the land are undocumented aliens. To the extent that this is so, great care must be taken to overcome their fears and educate them about their rights to engage in organization activities. Even one illegal act by Respondent may have a chilling effect on their confidence in their ability to do this.



Labor Code Section 1152 provides that employees have the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . .

"Implicit in these rights is the opportunity of workers to communicate with and receive communication from labor organizers about the merits of self-organization. . . . Since the A.L.R.A. became effective August 28, 1975, the Board's efforts to protect employee access to all legitimate channels of communication under these circumstances have been directed at facilitating employee ability to receive information both at the work site and in their homes. See 8 Cal. Admin. Code 20310(d)(2) (1975), repealed and re-enacted in 8 Cal. Admin. Code 20310(a)(2) and 20313." *Henry Moreno,* 3 A.L.R.B. No. 40, citing *Mapes Produce Co.,* 2 A.L.R.B. No. 54 (1976); *Silver Creek Packing Company,* 3 A.L.R.B. No. 13 (1977); 8 Cal. Admin. Code 20900 *et seq.* (1975), repealed and reenacted in part in 8 Cal. Admin. Code 20900 *et. seq.* (1976).

In *Henry Moreno, supra,* the Board ordered "In this and any such case in the future," remedies of expanded access, "in order to enable organizers to make such contacts with employees which they might have made in those employees' homes but for the employers' unlawful conduct . . ." That precedent will be followed here. Accordingly, I shall recommend: During the next following access period which the Charging Party elects to take, pursuant to 8 Cal. Admin. Code 20900(e) *et seq.,* as many organizers as are entitled to access under Section 20900(e)(4)(A) may be present during working hours for organizational purposes and may talk to workers, and distribute literature, provided that such organizational activities to not disrupt work.

During those access periods before and after work and during lunch, as specified in Section 20900(e)(3)(A) and (B), the limitations on numbers of organizers specified in Section 20900(e)(4)(A) shall not apply.

Upon the basis of the entire record, the findings of fact, and conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended

## ORDER

Respondent, its officers, agents and representatives, shall:

1. Cease and desist from:

   a) Preventing or interfering with communications among employees at places where they work, during nonworking periods.

   b) Preventing or interfering with the right of its employees to communicate freely with and receive information from organizers at their homes located on Respondent's premises.

   c) In any other manner interfering with, restraing or coercing employees in their exercise of rights guaranteed by Labor Code Section 1152.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

   a) Post immediately on Respondent's premises copies of the attached NOTICE TO WORKERS for a period of thirty (30) consecutive days. The Regional Director shall review a list of the properties provided by Respondent to him and shall designate the locations where the attached NOTICE TO WORKERS shall be posted by Respondent. Such locations shall include, but not



be limited to, each bathroom wherever located on the properties, utility poles, and other prominent objects within the view of the usual work places of the employees. Copies of the notice shall be furnished by the Regional Director in English, Spanish, and any other native languages spoken by Respondent's employees. The Regional Director shall determine a second period of thirty (30) consecutive days within the next twelve months when these notices shall again be posted on Respondent's premises.

b) Have the attached Notice read in English and Spanish at the time that the Regional Director determines the Notice shall be read, by a company representative or by a Board agent, at a time the Regional Director determines appropriate. After this reading, the Board agent is to be accorded the opportunity to answer questions which employees might have regarding the Notice and their rights under Labor Code Section 1152. Non-hourly wage employees will be compensated for this time on an equitable rate established by the Regional Director.

c) Mail a copy of the attached Notice, in both English and Spanish, to all of the employees listed on its master payroll for the payroll periods including the dates of November 26, 1977 through the current payroll period. These Notices shall be mailed within seven (7) days following the issuance of this Order.

d) Upon filing of a written notice of Intent to Take Access, pursuant to 8 Cal. Admin. Code 20900(e)(1)(B), the Union shall have the right of access as provided by 8 Cal. Admin. Code 20900(e)(3), without restriction as to numbers of

organizers. In addition, during this same period, the Union shall have the right of access during working hours for as many organizers as are permitted under 8 Cal. Admin. Code 20900 (e)(4)(A), which organizers may talk to workers and distribute literature, provided that such organizational activities do not disrupt work.

e) During the thirty-day period in which the Union exercises its rights to take access, Respondent shall provide the Union with an updated list of its current employees and their addresses for each payroll period. Such list shall be provided without requiring the Union to make any showing of interest.

f) Respondent shall provide the Union access to its employees during regularly scheduled work hours for two (2) hours, during which time the Union can disseminate information to and conduct organizational activities with Respondent's employees. The Union shall present to the Regional Director its plans for utilizing this time. After conferring with both the Union and Respondents concerning the Union's plans, the Regional Director shall determine the most suitable times, to occur during Respondent's next harvest season, and the manner for such contact between Union organizers and Respondent's employees. During this time, no employee will be allowed to engage in work-related activities. No employee shall be forced to be involved in the organizational activities. All employees will receive their regular pay for the two hours away from work. The Regional Director shall determine an equitable payment to be made to non-hourly wage earners for their lost productivity.



g) Respondent shall notify the Regional Director in writing, within twenty (20) days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: May 6, 1978

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Beverly Axelrod
*Administrative Law Officer*

## NOTICE TO WORKERS

The Agricultural Labor Relations Board has told us that Union organizers may enter our property and speak with you where you live or sleep before and after work. We will not interfere with organizers who come here. You may talk with them freely.

The Agricultural Labor Relations Act is a law that gives all farmworkers these rights:

1. To organize themselves;
2. To form, join, or help unions;
3. To bargain as a group and to choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help and protect one another;
5. To decide not to do any of these things.

You are free to read and to receive Union literature from fellow workers or Union organizers, and we will not interfere.

We recognize that the Agricultural Labor Relations Act is the law in California. If you have any questions about your rights under the Act, you can ask an agent of the Board. The nearest Board office is at 1350 Front Street, Room 2056, San Diego, California 92101, and its phone number is (714) 237-7119.

Dated: _____

By _____
*(Name)* *(Title)*

NAGATA BROTHERS FARMS, INC.

**APPENDIX B**

**STATE OF CALIFORNIA**

**AGRICULTURAL LABOR RELATIONS BOARD**

| | |
|---|---|
| NAGATA BROTHERS FARMS,<br>*Respondent,*<br>and<br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br>*Charging Party.* | **Case Nos. 77-CE-25-X**<br>**77-CE-25-A-X**<br>**77-CE-34-X**<br>**77-CE-37-X**<br><br>**5 ALRB No. 39** |

## DECISION AND ORDER

On May 6, 1978, Administrative Law Officer (ALO) Beverly Axelrod issued the attached Decision in this matter. Thereafter, Respondent and Charging Party each filed exceptions, a supporting brief and a brief in reply to the other's exceptions. The General Counsel also filed a brief in reply to Respondent's exceptions.

The Board has considered the record and the attached ALO Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the ALO, and to adopt her recommended Order, as modified herein.

Respondent has submitted 30 exceptions, 24 of which we hereby dismiss as either unsupported by the record or immaterial to the determination of this case. The remaining six objections taken together make four points: (1) that the acts of Respondent found by the ALO to be violations of Labor Code Section 1153(a) were based on good faith ignorance or misinterpretation of the applicable legal requirements; (2) that such acts only "minimally" infringed on employees' rights; (3)

that the recommended remedy of expanded work-site access is improper because no violation of access rule, 8 Cal. Admin. Code 20900, was found; and (4) that imposing no limit on the number of organizers who may take remedial expanded access is improper.

**Interference with Employee Communication**

Respondent's interference, on December 12 and 13, 1977, with the attempts of some of its employees to discuss with other employees subjects related to collective bargaining was clearly in conflict with employees' rights guaranteed by Section 1152 of the Act. Regardless of whether these were isolated incidents, or whether they were based on ignorance and/or good faith, as Respondent contends, such interference violated Section 1153(a). The test for a violation of Section 1153(a) of the Act, like that for a violation of its counterpart Section 8(a)(1) of the National Labor Relations Act, does not focus on the employer's knowledge of the law, on the employer's motive, or on the actual effect of the employer's action. It is well settled that:

> Interference, restraint and coercion under Section 8(a)(1) of the [N.L.R.A.] does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may be reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *Cooper Thermometer Co.*, 154 NLRB 502, 503 n. 2, 59 LRRM 1767 (1965); *American Freightways Co.*, 124 NLRB 146, 147, 44 LRRM 1302 (1959).

It is also well settled that "a violation of the Act does not need to be wholesale to be a violation." *NLRB* v. *Puerto Rico Telephone Co.*, 357 F.2d 919 (1st Cir., 1961), 61 LRRM 2516, 2517. Accordingly, we hereby dismiss Respondent's exceptions designated (1) and (2) above.



**Access to Employees**

This Board has consistently ruled that communication between employees and union representatives at the employees' homes is "not only legitimate, but crucial to a proper functioning of the Act." *Silver Creek Packing Company, supra,* at p. 4; *Mapes Produce Co.*, 2 ALRB No. 54 (1976). In *United Farm Workers of America* v. *Superior Court (Buack Fruit Co.)*, 14 Cal.3d 902 (1975), the California Supreme Court held that the First Amendment to the United States Constitution requires that union organizers be permitted access to employees at their homes, even if those homes are on property owned by the employer. This Board has acknowledged its own responsibility to protect employee rights "in a manner which is realistically responsive to the setting" in which they are exercised, *Henry Moreno,* 3 ALRB No. 40, p. 10 (1977), a responsibility that becomes particularly acute when we are faced with conditions of severe deprivation and vulnerability such as those in which many of the Respondent's employees were living. In the context of such conditions, union organizers must be able to take access in motor vehicles to employees at their dwellings if the employees' right to receive visitors and information is to have any substance at all. We affirm the ALO's conclusion that Respondent interfered with employees' Section 1152 rights and violated Section 1153(a) of the Act on November 26, 1977, by making it impossible for the UFW representatives to drive to where the employees were living. We find it unnecessary to deal with the Charging Party's exception to the ALO's determination that this incident did not constitute a violation of 8 Cal. Admin. Code 20900.

**Remedies**

Respondent excepts to those provisions of the ALO's proposed remedial Order whereby the UFW would be permitted to take more extended access to Respondent's employees than is ordinarily available under the access rule, 8 Cal. Admin. Code 20900. Respondent argues that expanded access is

inappropriate where no violation of the access rule has been found. In our view, the fact that Respondent violated a right of access based on the U.S. Constitution rather than on our regulations does not make expanded access any less appropriate as a remedy.[1]

Respondent excepts specifically to the remedies provided in paragraph 2(d) of the ALO's proposed Order, whereby (1) upon the filing by the UFW of a Notice of Intent to Take Access, an unlimited number of organizers would be permitted to take access during the thirty-day period provided by 8 Cal. Admin. Code 20900(e)(1)(B), and (2) during the same period the number of organizers permitted by 8 Cal. Admin. Code 20900(e)(4)(A) would be allowed to take access during working hours to talk to workers and distribute literature.

In considering these exceptions we must determine the kinds of extra access, and the extent thereof, best suited to effectuate the purposes of the Act.

The purpose of remedies we impose is to correct the effects of proven violations of the Act. Respondent's violations proven here were in the nature of isolated incidents rather than a course of conduct of long duration. In assessing the impact of those violations upon protected employee rights, however, the situation of the employees affected must be taken into account. We believe that Respondent's refusal on December 12 to

[1] Expanded access can be a proper remedy even where no violations of access rights have been found, as it was in *Henry Moreno, supra.* There the employer had violated 8 Cal. Admin. Code 20910 by failing to provide a union with lists of its employees. We pointed out that expanded access "would enable organizers to make such contacts with employees which they might have made in those employees' homes, but for the employer's unlawful conduct." 3 ALRB No. 40 at p. 10. See also *Sunnyside Nurseries, Inc.,* 3 ALRB No. 42 (1977), where our Order provided expanded access because we deemed "such access necessary for the UFW to reorganize employees after the unlawful discharge of 25 percent of the known UFW supporters." *Id.* at p. 2.



permit communication among employees about unionization and Respondent's particularly dramatic interference with such communication on December 13 were likely to create among employees an impression that their rights were subject to Respondent's power and control. This is totally contrary to the policy of the State set forth in Section 1140.2 of the Act:

> It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In order to correct any such impression of subjection to their employer on the part of Respondent's employees, our remedial Order will retain the provision in the ALO's proposed Order requiring Respondent to provide the UFW access to its employees during two regularly scheduled work hours, for which the employees are to receive full pay, during which time the UFW may disseminate information and conduct organizational activities.[2]

We uphold the aforementioned specific exceptions taken by Respondent to the extent that we shall, first, limit the number of UFW organizers who may take access during the next thirty-day period for which the UFW files a Notice of Intent to Take Access pursuant to 8 Cal. Admin. Code

[2] We do not agree with the assertion in Member McCarthy's dissent to this part of our Remedial Order that in providing two hours of company time we are being inconsistent with earlier cases such as *Anderson Farms Company,* 3 ALRB No. 67 (1977) and *Belridge Farms,* 4 ALRB No. 30 (1978). There, as here, our effort was to impose remedies tailored to the nature and the context of the misconduct, the effects of which we sought to overcome.

20900(e)(1)(B) to twice the number of organizers ordinarily permitted by 8 Cal. Admin. Code 20900(e)(4)(A), instead of the unlimited number of organizers permitted by paragraph 2(d) of the ALO's proposed Order. *See Pandol and Sons* v. *ALRB*, 77 Cal.App.3d 822 (1978). Second, we shall eliminate from our Order the access to employees at their job sites during work hours which the ALO proposed, as we believe the opportunities for communication among organizers and employees otherwise provided in our Order are, when viewed together with the supplementary remedial measures contained in the Order, sufficient to remedy the effects of Respondent's violations of law.

The Charging Party has excepted to the lack of specificity in the ALO's proposed Remedial Order concerning the manner in which union representatives are to be permitted to take access to employees at their dwellings. At a meeting held on November 23, 1977, the parties agreed upon specific terms for union access to employees before work and during the lunch hour. They planned to reconvene in order to discuss access during non-work time to employees living on Respondent's property, but the access violation found here occurred before they met again. Under these circumstances, we believe it is more appropriate for the parties to determine reasonable times for UFW representatives to drive onto Respondent's property to visit employees at their dwellings during non-work time than for us to impose a detailed plan for the taking of such access. As our Regulation Section 20900(e)(2) states in regard to agreements between parties respecting access, "The parties are encouraged to reach such agreements and may request the aid of the Regional Director and Board Agents in reaching such agreements. . . ." Under the terms of our Remedial Order, the Regional Director shall have authority to determine whether the terms agreed upon are reasonable and to specify reasonable terms if the parties fail to reach agreement.



## ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Nagata Brothers Farms, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Preventing or interfering with the United Farm Workers of America (UFW), or other labor organization, in its communications with employees at places where they work, during non-work periods.

(b) Preventing or interfering with the right of its employees to communicate freely with and receive information from the UFW or any other labor organization at their dwellings located on Respondent's premises or elsewhere.

(c) In any other manner interfering with, restraining or coercing employees in their exercise of rights guaranteed by Labor Code Section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Sign the Notice to Employees attached hereto which, after translation by the Regional Director into Spanish and other appropriate languages, shall be provided by Respondent in sufficient numbers in each language for the purposes set forth hereinafter.

(b) Within 31 days after the issuance of this Order, mail a copy of the attached Notice in appropriate languages to each of the employees who were on its payroll at any time during the period from November 26, 1976, to the date of mailing.

(c) Post copies of the attached Notice in all appropriate languages for 60 consecutive days in conspicuous places on its property, the period and places of posting to be determined by the Regional Director. The Regional Director shall determine a second period of 60 consecutive days within the next twelve months when these Notices shall again be posted on Respondent's premises. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(d) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in all appropriate languages to its employees assembled on company property, at times and places to be determined by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Agricultural Labor Relations Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(e) Furnish such proof as may be requested by the Regional Director that the Notice has been mailed and distributed in the manner described above.

(f) Permit UFW organizers to take access as provided by 8 Cal. Admin. Code 20900(e)(3), their number to be limited to twice the number permitted by 8 Cal. Admin. Code 20900(e)(4)(A), upon filing by the UFW of a written Notice of Intent to Take Access pursuant to 8 Cal. Admin. Code 20900(e)(1)(B).



(g) Provide the UFW, during the 30-day period in which it exercises its rights to take access, an up-to-date list for each payroll period of its current employees and their addresses.

(h) Provide the UFW access to its employees during regularly-scheduled work time for two hours during which time the UFW may disseminate information to and conduct organizational activities among Respondent's employees. The UFW shall present to the Regional Director its plan for utilizing this time. After conferring with both the UFW and Respondent concerning the UFW's plans, the Regional Director shall determine the most suitable times, to occur during Respondent's next harvest season, and the manner for such contact between UFW organizers and Respondent's employees. During such times, no employee will be allowed to engage in work-related activities, but no employee shall be forced to be involved in the organizational activities. All employees will receive their regular pay for the two hours away from work. The Regional Director shall determine an equitable payment to be made by Respondent to non-hourly wage earners for their lost work-time.

(i) Permit UFW representatives to drive to the dwelling sites of employees on its property at reasonable times; such times are to be determined by the Regional Director if the parties fail to agree thereon.

(j) Respondent shall notify the Regional Director in writing, within 30 days from the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: May 23, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER McCARTHY, Concurring in Part, Dissenting in Part:

I concur in the result of the majority opinion but I refrain from endorsing its broad remedial order. The imposition of a paid two-hour rather than a one-hour company time provision is excessive under the facts and circumstances of this case as well as being inconsistent with our prior remedies in comparable cases. See, e.g., *Anderson Farms Company,* 3 ALRB No. 67 (1977) and *Belridge Farms,* 4 ALRB No. 30 (1978).

Dated: May 23, 1979

JOHN P. McCARTHY, Member.

## NOTICE TO EMPLOYEES

The Agricultural Labor Relations Board has found that we violated the rights of our workers by interfering with conversations among them on subjects related to collective bargaining and by refusing to let organizers of the United Farm Workers come onto property under our control in motor vehicles to visit employees during non-work hours. The ALRB has ordered us not to interfere with, restrain or coerce you, our employees, in the exercise of rights guaranteed by the Agricultural Labor Relations Act, and to permit UFW organizers to come onto our property in motor vehicles to visit and communicate with you at your dwellings. The ALRB has also ordered us to mail, post, distribute, and allow this Notice to be read to our employees.



We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. form, join, or help unions;

3. To bargain as a group and choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another; and

5. To decide not to do any of these things.

You are free to read and to receive UFW literature from fellow workers or Union organizers, and we will not interfere. We will permit UFW organizers to come onto property under our control in motor vehicles to visit and communicate with you at your dwellings.

Dated:

NAGATA BROTHERS FARMS

By: _____
*(Representative)* *(Title)*

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

Nagata Brothers Farms (UFW) 5 ALRB No. 39
Case Nos. 77-CE-25-X
77-CE-25-A-X
77-CE-34-X
77-CE-37-X

**ALO Decision**

The ALO concluded that Respondent, by preventing union organizers from driving to sections of the property under its ownership or control where employees were living, violated the right of its employees to receive at their homes or dwellings communication regarding their statutory rights to organize and to select a collective bargaining representative, thereby violating Section 1153(a) of the Act.

The ALO also concluded that Respondent violated Section 1153(a) by forcibly preventing on two occasions one group of its employees from communicating with another group of employees regarding their rights to organize.

The ALO found that as the General Counsel failed to establish that any employees were working after 3:30 p.m. on November 26, he therefore failed to prove the allegation that Respondent's denial of access at 4:30 p.m. that day constituted a violation of 8 Cal. Admin. Code 20900(e)(3)(A).

The ALO's proposed Remedial Order provided, among other things, access by an unlimited number of organizers during the UFW's next access period, access to workers at their job-sites during working hours, and two hours of paid company time for organizational activities.

**Board Decision**

The Board affirmed the ALO's findings of fact and conclusions of law as to Respondent's violations of Section 1153(a) but did not reach its alleged violation of 8 Cal. Admin. Code 20900. The Board modified the ALO's proposed Remedial Order by removing the provision for access at employees' job-sites during working hours and by limiting the number of organizers permitted to take access during the next access period to twice the number ordinarily permitted under 8 Cal. Admin. Code 20900(e). The Board's Order provided for two hours of paid company time for UFW organizational activities



among employees. The Board also ordered Respondent to permit UFW representatives to drive to the dwelling sites of employees on its property at reasonable times, such times to be determined by the Regional Director if the parties fail to agree thereon.

Member McCarthy concurred in the result of the case but dissented to the provision in the Remedial Order for two hours of paid company time, rather than one hour, for organizational activities.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

# APPENDIX C

4th Civil No. APP. 2 DIV 4

COURT OF APPEAL - FOURTH DIST.

FILED

ROBERT L. FORD, Clerk

DEPUTY CLERK

IN THE

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

STATE OF CALIFORNIA

DIVISION ONE

| | | |
|---|---|---|
| NAGATA BROTHERS FARMS<br><br>Petitioner,<br><br>vs.<br><br>AGRICULTURAL LABOR RELATIONS BOARD<br><br>Respondent. | ) | ALRB Case Nos. 77-CE-25-X<br>77-CE-25-A-X<br>77-CE-34-X<br>77-CE-37-X<br><br>(5 ALRB No. 39) |

PETITION FOR REVIEW OF AN ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD
(California Labor Code § 1160.8)

JAMES K. SMITH, ESQ.
DANIEL R. CARL, ESQ.
Gray, Cary, Ames & Frye
2100 Union Bank Bldg.
San Diego, California 92101
(714) 236-1661

Attorneys for Petitioner

# APPENDIX D

# COURT OF APPEAL—STATE OF CALIFORNIA

## FOURTH APPELLATE DISTRICT

**DIVISION ONE**

| | |
|---|---|
| SAGATA BROTHERS FARMS,<br>Petitioner,<br>vs.<br>AGRICULTURAL LABOR RELATIONS BOARD,<br>Respondent,<br>UNITED FARM WORKERS, AFL-CIO,<br>Real Party in Interest. | 4 Civil No. 22002<br>SUPERIOR COURT NO. -<br>ALRB Case Nos. 77-CE-25-X<br>77-CE-34-X<br>77-CE-37-X<br>77-CE-25-A-X |

BY THE COURT:

The petition for review of an order of the Agricultural Labor Relations Board is denied.

Presiding Justice

Copies to: Gray, Cary, Ames & Frye-SD
ALRB-SAC
ALRB-SD
UFW, AFL-CIO-San Ysidro
Cohen, Carder, Greenstone & Dalzell-SF
Maren E. Lopez-Salinas

# APPENDIX E

4th Civil No. 22002

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

NAGATA BROTHERS FARMS,

Petitioner,

vs.

THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,

Respondent,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Real Party in Interest.

SUPREME COURT
FILED
NOV 26 1979
Clerk
Deputy

# PETITION FOR HEARING

FOLLOWING DENIAL BY THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE, OF A PETITION FOR REVIEW OF A FINAL ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD.

JAMES K. SMITH
DANIEL R. CARL
GRAY, CARY, AMES & FRYE
2100 Union Bank Building
San Diego, California 92101
Telephone: 714/236-1661

Attorneys for Petitioner
NAGATA BROTHERS FARMS

# APPENDIX F

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

DEC 13 1979

*I have this day filed Order* _____

*In re:* 4 Civ. *No.* 22002

Nagata Brothers Farms

*vs.*

ALRB

*Respectfully,*

G. E. BISHEL
*Clerk*

96376-677 2-79 4M OSP

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

IN THE
**SUPREME COURT OF THE UNITED STATES**

October Term, 1980

No. 79—1448

NAGATA BROTHERS FARMS,
*Petitioner,*
v.
THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,
*Respondent,*
AND
UNITED FARM WORKERS OF AMERICA, AFL-CIO
*Real Party in Interest.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT DIVISION ONE

# BRIEF FOR RESPONDENT IN OPPOSITION

ELLEN LAKE
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MANUEL M. MEDEIROS
*Assistant Chief of Litigation*
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IN THE

**SUPREME COURT OF THE UNITED STATES**

---

October Term, 1980

NAGATA BROTHERS FARMS,

*Petitioner,*

v.

THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,

*Respondent,*

AND

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

*Real Party in Interest.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA
COURT OF APPEAL

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

The respondent, Agricultural Labor Relations Board of the State of California, respectfully requests that this Court deny the petitioner's writ of certiorari seeking review of the Supreme Court of California's denial of petitioner's request for hearing.

## QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review a state administrative order granting union organizers a limited right of vehicular access where the terms of the order are not final, the order rests on an independent state ground, and the order results from a careful balancing of employee organizational rights and employer property interests?

2. Does a substantial federal question arise, although it was not raised in the state courts below, from the California court procedure of denying without opinion unmeritorious petitions for review of administrative orders after briefing by all the parties?

## STATEMENT OF THE CASE

### A. INTRODUCTION: The Agricultural Labor Relations Act

For decades California has witnessed strife and conflict in its fields and vineyards. Federal labor laws have brought no relief to the California fields because those statutes exempt agricultural employees from their coverage. (29 U.S.C. §§ 152 (3), 203(f).)

To bring "certainty and a sense of fair play" to an "unstable and potentially volatile condition," (ALRA Preamble, Stats. 1975, Third Ex. Sess., Chap. 1, § 1), the California Legislature enacted the Agricultural Labor Relations Act of 1975 (hereinafter, "ALRA" or the "Act"). (Cal. Labor Code §§ 1140, et seq.) A comprehensive agricultural labor relations statute, the ALRA



establishes a five-member Agricultural Labor Relations Board (hereinafter, "ALRB" or the "Board") (Cal. Labor Code § 1141); grants employees organizational rights (Cal. Labor Code § 1152); provides for secret ballot elections to select a collective bargaining representative or no union (Cal. Labor Code §§ 1156–1159); and characterizes a variety of acts by employers or unions as unfair labor practices, including interference with employees' organizational rights. (Cal. Labor Code §§ 1153 –1155.7.) While modeled in some respects on the National Labor Relations Act, the ALRA's election provisions are significantly different from those under the NLRA, reflecting the exigencies of a seasonal industry with a mobile workforce.

### B. The Findings of the ALRB in the Instant Case

Petitioner, Nagata Brothers Farms, a partnership, operates three ranches producing tomatoes and strawberries. The violation at issue here occurred at one of the ranches, referred to as the "Wilshire Ranch", located in northern San Diego County. The Wilshire Ranch is composed of four leased parcels, each of which is a square with sides one-quarter of a mile in length. Three parcels adjoin north to south, and the fourth parcel is directly east of the southern-most parcel so that all four parcels form an "L". George and Harry Nagata are involved in the day to day management of the farm.

The incident at issue in this case, an attempt by United Farm Workers of America, AFL-CIO, (hereinafter UFW) organizers to enter the farm as a part of an organizing campaign, took place at the end of Wilshire Road

on the Wilshire Ranch. Vehicular entry to this ranch at any place other than the gate at the foot of Wilshire Road is precluded by fencing, ditches, the contour of the land, and a gate near the home of Harry Nagata which itself is on the ranch. The gate which prevents access at Wilshire Road is a single locked cable stretched across the road. A number of individuals or organizations have keys to the lock, including the three Nagata brothers, their foreman, the Immigration and Naturalization Service, the Oceanside Police Department, the gasoline company, the propane delivery truck service which refuels the large propane stove used by workers, and the catering service, which provides food to the employees during the work day and after work.

On November 22, 1977, UFW representative Scott Washburn served a notice of intent to take access on petitioner at its business office. The next day, representatives of Nagata Brothers Farms and other growers whose employees were being organized by the UFW met with the ALRB's San Diego Regional Director and Washburn to work out an agreement for organizer access to employees. Although the meeting lasted about four hours and there was discussion regarding the mechanics of access, no agreement was reached.

On November 26, 1977, at approximately 4:30 p.m., a group of union organizers arrived at the Wilshire Road gate. The gate was locked and they could not drive in. They went to petitioner's office and asked for entry. Washburn informed Harry Nagata that they wanted to drive on the ranch and talk to employees where they



lived. Harry Nagata denied knowledge of, or responsibility for, where the workers lived. Washburn made no further attempts to enter the ranch that day. The Board concluded that this denial of access violated California Labor Code section 1153(a), which prohibits interference, restraint, or coercion of agricultural employees in the exercise of rights guaranteed by California Labor Code section 1152.

At the time of this incident, Nagata Brothers Farms employed about 220 workers. Approximately 25 commuted to the ranch each day. The other 195, the Board found, lived on the ranch in conditions of extreme deprivation.[1] Testimony, some by the Nagata brothers themselves, established that the 195 "local" employees lived in plastic tents, caves, or boxes in the rows between the tomato vines. They cooked over campfires or used the propane stove provided by the company, cooking food purchased from the catering service which petitioner permitted to drive onto the property after work hours. Clothes, food, blankets, and household items were occasionally seen in the fields. The company paid the "locals" $2.50 per hour—40 cents per hour less than was paid to the commuters, who also received a separate ride allowance. The workers living on the property had no cars, and there was no public transportation to the ranch. "Locals" had been seen to run away at the sight

[1] Petitioner disputes this finding by the Board. (Petition, p. 7.) However, this Court generally will not re-examine a state court's findings of fact. (*Portland Ry. Co.* v. *Oregon R.R Comm.* 229 U.S. 397, 411–412 (1913); *Fry Roofing Co.* v. *Wood* 344 U.S. 157, 160 (1952).)

of agents or automobiles from the federal Immigration and Naturalization Service, suggesting that they were undocumented workers.[2]

The evidence also established that the employees' dwellings were widely scattered throughout the ranch and that vehicular travel was the customary method of travel within the ranch. Besides the use of cars or trucks by the police, Immigration and Naturalization Service, gasoline company, and catering service, the company transported employees to different work sites by truck. The above factors demonstrate the reasonableness of the Board's limited access order.

### C. The Procedural History of This Case

A hearing was held before an administrative law officer (hereinafter ALO) on April 4 through 7, 1978. On May 6, 1978, the ALO concluded that petitioner had, in fact, violated California Labor Code section 1153(a) by engaging in the conduct alleged in the complaint.[3] On May 23, 1979, the ALRB affirmed the rulings, findings, and conclusions of the ALO, set forth its reasoning, and modified the ALO's recommended order.[4] Petitioner sought review thereof in the California Court of Appeal,

[2] The protections of the ALRA are available to all California agricultural employees, whether documented or undocumented. *Miranda Mushroom Farm Inc.*, 6 ALRB No. 22 (1980). However, federal law makes it a crime to harbor illegal aliens. 8 U.S.C. § 1324(a)(3). This may explain petitioner's refusal to admit that employees resided on its property. However, when Nagata Brothers provided the ALRB with a list of its employees' names and addresses, the list gave petitioner's address for 196 workers.

[3] Petitioner's Appendix A.

[4] Petitioner's Appendix B.



Fourth Appellate District, Division One, by filing its petition for review on June 21, 1979. (Cal. Labor Code § 1160.8.)[5] The Board filed the administrative record with the court on July 2, 1979, and the court ordered a briefing schedule in accord with California Rules of Court, Rule 16(a). Because an extension of time was granted to petitioner, petitioner's brief was not filed until August 31, 1979. Respondent ALRB's brief was filed October 1, 1979, and real party's (UFW) brief was filed on October 31, 1979. Petitioner's reply brief was filed on November 15, 1979. On November 16, 1979, after full briefing by all parties, the Court of Appeal denied the petition for writ of review.[6] Petitioner then filed a petition for hearing, accompanied by a brief, with the California Supreme Court (Cal. Rules of Court, Rule 28); the ALRB filed an opposition brief. The petition for hearing was denied on December 13, 1979.[7]

## I

## THE ACCESS PROVISION OF THE BOARD ORDER IS NOT FINAL. FURTHER, PETITIONER RAISES NO SUBSTANTIAL FEDERAL QUESTION WITH RESPECT TO THAT PROVISION

### A. The Access Provision is Not Final

In order for this Court to acquire jurisdiction, there must have been a final judgment in the highest state court. (28 U.S.C. § 1257.) Under the finality doctrine, an

[5] Petitioner's Appendix C.

[6] Petitioner's Appendix D.

[7] Petitioner's Appendix E.

administrative order which has been reviewed by the highest state court must be the final adjudication of a completed administrative process in order to be reviewable by the Supreme Court. (Stern and Gressman, *Supreme Court Practice,* 5th Ed. (1978) p. 197; *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 130–131 (1939).)

*Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62 (1948) illustrates this principle well. There the Oklahoma Corporation Commission ordered Republic to take natural gas ratably from another gas company. However, the terms and conditions of the taking were left to be agreed upon between the two companies, or if there was no agreement, to be determined by further order of the commission. On appeal, the United States Supreme Court held that the administrative judgment was not final because the manner of the taking had been left open for a later agreement or administrative determination.

The challenged portion of the ALRB order in this case is nearly identical to that in *Republic Natural Gas.* Section 2(i) of the order—the only provision challenged by petitioner—requires the company to "permit UFW representatives to drive to the dwelling sites of employees on its property at reasonable times; *such times are to be determined by the Regional Director if the parties fail to agree thereon.*" (Petitioner's Appendix B, p. 9, emphasis added.) Thus, the times and extent of the vehicular access are left open. Nothing is now final.

This lack of finality is underscored by the petition



itself. Petitioner has made clear that it does not oppose vehicular access per se. It states: "Petitioner was, and is, willing to permit vehicular access upon notice. . . ." (Petition, p. 10.) Since the Board order leaves the access mechanics to be agreed upon by the parties or decided by the regional director, petitioner may find itself fully satisfied with the ultimate access arrangements.

Under these circumstances, adjudication by this Court would be premature and therefore jurisdictionally defective.[8]

### B. The Board's Access Analysis Rests on an Adequate Statutory Ground

In reality, petitioner seems disturbed by the language of the Board's decision, rather than by the judgment. However, that is no basis on which to predicate this Court's jurisdiction. As the Court said in *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297–298 (1955), "This Court, however, reviews judgments, not statements in opinions."

The petition makes much of the First Amendment analysis contained in portions of the Board opinion. That concern is misplaced. A careful reading demonstrates that the Board's access reasoning rested as fully on statu-

[8] Petitioner wrongfully characterizes the Board order as providing "unfettered" or "unrestricted" vehicular access. (Petition, pp. 2, 10.) This plainly false position demonstrates the insubstantiality of the petition. Since Nagata Brothers Farms is willing to provide vehicular access upon notice and the Board order requires nothing more, petitioner is complaining about a wrong which does not exist. The "question" raised by the petition is neither "substantial" nor "federal."

tory, as on constitutional, grounds. For example, the Board acknowledged "*its own* responsibility to protect employee rights" (Petitioner's Appendix B, p. 3, emphasis added); held that "Respondent interfered with employees' Section 1152 rights and violated Section 1153(a) on November 26, 1977, by making it impossible for the UFW representatives to drive to where the employees were living" (Petitioner's Appendix B, p. 3), and imposed remedies "to correct the effects of proven violations of the Act." (Petitioner's Appendix B, p. 4.)

Thus, the Board decision is fully supported on an independent statutory basis. Furthermore, because the California Court of Appeal which reviewed the Board's decision issued no opinion in rendering its judgment, this Court should presume that the state court's decision was based upon the nonfederal statutory ground and should decline jurisdiction. (*Lynch* v. *New York ex rel. Pierson,* 293 U.S. 52, 54–55 (1934); *Phyle* v. *Duffy,* 334 U.S. 431 (1948).)

### C. The Board Reached a Proper Accommodation Between Employee Organizational Rights and Petitioner's Property Rights

Petitioner's suggestion that the Board order constitutes an unwarranted infringement of its property rights is erroneous.

Prior decisions of this Court have held that private property rights must yield where necessary to accommodate the organizational rights of employees. (*NLRB* v. *Babock & Wilcox Co.,* 351 U.S. 105 (1956).) "In each generic situation, the primary responsibility for making



this accommodation must rest with the Board in the first instance. 'The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.' " (*Hudgens* v. *NLRB,* 424 U.S. 507, 522–523 (1976).) The proper accommodation depends heavily on the context of the particular case. (*Id.*)

In reaching the appropriate accommodation in this case, the ALRB was true to the principles of *Hudgens,* paying careful attention to the context in which this case arose. The Board especially noted the "severe deprivation and vulnerability" of petitioner's employees (Petitioner's Appendix B, p. 3), who lived in tents and caves between the tomato rows, cooking over campfires and leaving their belongings in the fields. (Petitioner's Appendix A, pp. 6–7.) The Board was aware that these workers were isolated on the ranch, since they had neither cars nor access to public transportation. (*Id.,* at 7.) These circumstances made the workers peculiarly subject to the company's power and control, in violation of state public policy. (Cal. Lab. Code § 1140.2.)

By contrast, granting a limited vehicular access right to union organizers would hardly constitute a significant infringement of the company's property rights. Vehicular travel was the only method of reaching the many employees living scattered throughout the ranch, and was the customary mode of travel by the company and all others entering the ranch. (Petitioner's Appendix A, p. 15.) At the time of the November 1977 access incident, the parties had to reconvene in order to discuss access to employees living on the ranch. (Petitioner's

Appendix B, p. 6.) The Board's order simply required the parties to negotiate the access agreement left incomplete two years earlier.

The accommodation reached by the Board strikes a proper balance between conflicting interests in light of the unique circumstances of this case. The petition raises no substantial federal question in this regard.

II

## PETITIONER RAISES NO SUBSTANTIAL FEDERAL QUESTION WITH RESPECT TO JUDICIAL REVIEW OF THE ALRB'S DECISION AND ORDER

### A. Petitioner did not Challenge the Constitutionality of California's Judicial Review Scheme in the Courts Below. This Claim is Raised for the First Time Here

It has long been established that this Court is vested with no jurisdiction unless a federal question was raised in the state court below. (*Cardinale* v. *Louisiana* 394 U.S. 437, 438 (1969); *Tacon* v. *Arizona* 410 U.S. 351, 352 (1973).) In its petition and reply brief to the court of appeal and its petition for hearing in the California Supreme Court, petitioner did not even imply, let alone argue, that the review scheme pursuant to California Labor Code section 1160.8 violates a federal constitutional right.

California Rules of Court, Rules 12, 28(d), and 56 (governing review in the court of appeal and hearing in the Supreme Court) require, at a minimum, setting forth what is necessary for a proper consideration of the case.



Petitioner has an affirmative duty in the instant case to show not only the existence of a federal question but also that it was properly raised under state of law. (See *Williams* v. *Georgia* 349 U.S. 375, 382–383 (1955).) Petitioner has failed on both counts. Attached as Appendix A hereto is a copy of the Table of Contents from petitioner's briefs to the California Court of Appeal and Supreme Court. It is plain that the constitutionality of the review scheme here in question was not presented to those courts.

The federal question was not properly or timely raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. (See Supreme Court Rule 23(1)(f).)

### B. Petitioner's Attack on California's Review Scheme Fails Because a Decision to Deny a Petition for Writ of Review is, in Fact, a Decision on the Merits of the Case

Petitioner does not contend that it was denied due process of law in the administrative hearing. Nor does petitioner challenge the scope of review of a Board decision. Although it is unclear what exactly offends petitioner, the thrust of petitioner's complaint is that it did not receive a written decision and that this somehow means that it received perfunctory review. This contention is without substance.[9]

[9] Petitioner's reliance on *Morris* v. *Gressette* 932 U.S. 491 (1977) and *Abbott Laboratories* v. *Gardner* 387 U.S. 136 (1967) is not well taken. Both cases focus on whether judicial review is permitted at all. In *Morris* v. *Gressette* this Court concluded that Congress did not intend any judicial review of the administrative action. Thus, *Morris* undercuts petitioner's contention that all administrative decisions must be subject to plenary judicial review.

The rule in California is that a denial of a writ, where the writ proceeding is the sole avenue of review, is a determination on the merits of the case. (*People* v. *Western Air Lines Inc.* 42 Cal.2d 621, 630–631, 268 P.2d 723 (1954), app. dismd. 348 U.S. 859 (1954) [denial of review by the California Supreme Court of a Public Utility Commission's order is a decision on the merits]; *City of Union City* v. *Southern Pac. Co.* 261 Cal.App.2d 278, 67 Cal.Rptr. 816 (1968) [denial by court of petition to review a Public Utility Commission order is a decision on the merits both as to the law and the facts presented on review, even when the court's denial is without opinion.[10]

This Court has recognized this principle in *Napa Valley Co.* v. *R.R. Comm.,* 251 U.S. 366 (1920). In that case, an electric company petitioned the California Supreme Court to annul and vacate a commission order alleging that the rate-setting in question violated the federal constitution. A direct petition to the state Supreme Court was the sole method of review, but that Court denied the petition and refused to issue a writ. A successor to the electric company's contract sought relief; the commission moved to dismiss on the ground the state Supreme Court's denial of the writ, without opinion, was res judicata. This Court held that the "absence of an opinion by the Supreme Court did not affect the quality

[10] In California, review of a public utility commission decision or order is by writ of certiorari or review directly to the California Supreme Court. (Public Util. Code §§ 1756 et seq.) As this is the sole avenue of review, a denial of such a writ is a decision on the merits.



of its decision or detract from its efficacy as a judgment upon the question presented." (*Napa Valley Co.* v. *R.R. Comm., supra,* at 373.)

California Labor Code section 1160.8 sets forth the scheme for review of ALRB orders. Any person aggrieved by a final order of the Board may obtain review of the order in the court of appeal by filing a written petition requesting the order be modified or set aside. Upon the filing of such a petition, the court serves notice upon the Board thereby obtaining jurisdiction of the case. The findings of the Board with respect to questions of fact, if supported by substantial evidence on the record as a whole, are conclusive.

*Tex-Cal Land Management, Inc.* v. *Agricultural Labor Relations Bd.,* 24 Cal.3d 335, 156 Cal.Rptr. 1, 595 P.2d 579 (1979) is the definitive interpretation of Labor Code section 1160.8. There the court noted the Act's numerous procedural safeguards, such as separation of prosecutorial and adjudicatory functions, notice, written pleadings, evidentiary hearings, and a requirement that orders be accompanied by findings based on the preponderance of the reported evidence. With these protections in mind, the court construed the statute as allowing petitions for writs of review to be denied without opinion or oral argument, in the court's sound discretion. However, the California Supreme Court cautioned that appellate courts "should not make that disposition . . . until after the petitioner has had reasonable time to file points and authorities in light of the record filed by the ALRB." (*Tex-Cal Land Management, Inc.* v. *Agricul-*

*tural Labor Relations Bd.,* 24 Cal.3d at 351.) Thus, a party's due process rights are safeguarded at the administrative stage, and any party petitioning for review has an opportunity to fully brief all issues in light of a complete record. If a court determines that no material issues are presented, it need not write an opinion, but may simply deny the petition and thus affirm the Board. A court has discretion to deny a petition that is not meritorious—but such discretion in no way implies that the court may deny a petition without serious substantive consideration.[11]

Because the appellate court denied its petition for review soon after it filed its reply brief, petitioner suggests judicial review has been perfunctory. However, without standing over a judge's shoulder while he or she considers a case, it is impossible to know exactly how thorough the review is. In this case, the petition was filed on June 21, 1979 and the record was filed on July 2, 1979. Petitioner's brief was filed on August 31, 1979; respondent's brief was filed on October 1, 1979, and real party in interest's brief was filed on October 31, 1979. Petitioner's reply brief did not raise anything new. (See Respondent's Appendix A.) The court denied the petition on November 16, 1979. Thus, the petitioner's legal contentions were before the court of appeal for over

[11] *Tex-Cal Land Management, Inc.* holds that once a court of appeal denies a petition, it relinquishes jurisdiction. Enforcement of the Board's order is in the superior court. However, the superior court "shall not review the merits of the order." (Cal. Lab. Code § 1160.8.) The obvious implication is that there is no need for the superior court to review the merits of the order since the court of appeal has already made a decision on the merits.



four months and petitioner's brief for nearly two and one half months before the court acted. Surely, this is ample time for a considered judgment.

In short, that no opinion issued from the appellate court in this case says less about the quality of the review process than the court's view of the merits of the petition.[12] The procedural requirements which give petitioner an opportunity to fully brief the issues and which obligate the Board to file a certified record imply that review of Board decisions is a serious undertaking. Established California law holding that a denial of a petition is a decision on the merits reinforces the view that California judges would not make such a determination without seriously considering the case.

Finally, that the petition in this case was denied soon after the reply brief was filed, is not evidence from which to conclude that review was perfunctory. California law does provide for meaningful judicial review of orders and decisions of the State Agricultural Labor Relations Board and does not violate due process.

## CONCLUSION

Petitioner's writ of certiorari should be denied by this Court, because the order of the Agricultural Labor Relations Board is not final, no substantial federal question has been raised, and the Board engaged in a careful

[12] The practice of denying unmeritorious appeals without opinion or oral argument, relying instead on the briefs, is also used by this Court. Stern & Gresseman, in *Supreme Court Practice,* 5th ed. (1978), at pages 317–321, discuss the need and reason for this procedure.

statutory balancing of a kind approved by this Court. The procedure for judicial review of ALRB decisions, chosen by the California legislature, does not violate due process because it ensures full consideration of the merits of petitioner's case even though it allows an unmeritorious petition to be denied without opinion.

DATED: May 22, 1980 Respectfully submitted,

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**APPENDIX A**

PETITIONER'S BRIEF: PETITION FOR HEARING IN THE SUPREME COURT

Supreme Court, U. S.
FILED
MAY 24 1980
DAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1979
No. 79-1448

NAGATA BROTHERS FARMS,

*Petitioner,*

*vs.*

THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,

*Respondent,*

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

*Real Party in Interest.*

## Brief of Real Party in Interest in Opposition to Petition for Writ of Certiorari.

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and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

*Real Party in Interest.*

## Brief of Real Party in Interest in Opposition to Petition for Writ of Certiorari.

Real Party in Interest UNITED FARM WORKERS OF AMERICA, AFL-CIO respectfully opposes the granting of the Petition for a Writ of Certiorari in this case on the grounds that this Court lacks jurisdiction of this action and that no substantial federal question is presented.

**Jurisdiction.**

Petitioner submits[1] this Court has jurisdiction pursuant to 28 U.S.C. § 1257(3), which requires, inter alia, a "[f]inal judgment or decree rendered by the highest court of a State in which a decision could be had . . . ." The requisite finality being absent in this case, this Court does not have jurisdiction.

The facts which belie Petitioner's implicit and unargued assertion of finality focus upon the remedial order issued by the California Agricultural Labor Relations Board[2] after the finding that Petitioner violated the California Agricultural Labor Relations Act[3] by obstructing Real Party in Interest's organizers' access to Petitioner's employees residing on ranch property. The Board's order challenged by the Petitioner provides:

> "[Petitioner shall] [p]ermit UFW representatives to drive to the dwelling sites of employees on its property at reasonable times; such times are to be determined by the Regional Director if the parties fail to agree thereon."[4]

---

[1]Petition for a Writ of Certiorari (hereinafter referred to as "Petition"), p. 2.

[2]Hereinafter referred to as "Board." The Board is established pursuant to California Labor Code § 1141 (West's Suppl. 1980) and is responsible for the implementation of the California Agricultural Labor Relations Act.

[3]California Labor Code § 1140 *et seq.*; hereinafter referred to as "ALRA." The ALRA, enacted in May, 1975, established comprehensive regulation of labor relations in California agriculture. See generally, *Agricultural Labor Relations Board v. Superior Court*, 16 Cal.3d 392, 398-400, 128 Cal.Rptr. 183, 186-187, 546 P.2d 687, 690-691 (1976), *appeal dismissed for want of substantial federal question, sub nom., Kubo v. Agricultural Labor Relations Board* and *Pandol & Sons v. Agricultural Labor Relations Board*, 429 U.S. 802 (1976). The ALRA is modelled after, but not identical to, the National Labor Relations Act.

[4]Board Decision, App. B, p. 10.



To date, the further proceedings contemplated by this order have not been initiated.

Section 1257's finality requirement prevents piecemeal review of state court decisions, bars advisory opinions and enhances federal-state relations by limiting federal constitutional oversight of state affairs. *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 159 (1973). These interests militate in the case at bar against Petitioner's unacknowledged and unexamined contention that the Board's order is final for purposes of this Court's review. The extent of the required access has not been determined, rendering any opinion by this Court advisory. Review at this juncture would usurp the Board's efforts to resolve the access issue in light of its expertise.[5] Finally, since Petitioner concedes the propriety of some access,[6] the subsequent proceedings may avoid any claimed constitutional infirmity in the Board's order.

*Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948), dictates the conclusion that this Court lacks jurisdiction. In *Republic Natural Gas Co.*, the administrative agency's order required the petitioner to take gas from a field "upon terms agreed upon . . . or, in the event of failure to agree, upon terms fixed by the [agency]." *Id.*, 334 U.S., at 63. This order, found to lack the required finality,[7] parallels the order challenged by Petitioner in this case.

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[5]In *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 504 (1978), it was noted that "it is the [National Labor Relations] Board upon whom the duty falls in the first instance to determine the relative strength of the conflicting interests and to balance their weight." If the parties are unable to agree on reasonable access, the Board should be accorded the initial opportunity to weigh the competing factors.

[6]Petition, p. 10.

[7]The factors focused upon were that the remaining action required exercise of discretion and that the State should have the opportunity to resolve the controversy without federal interference. 334 U.S., at 69-71.

Thus, Petitioner fails to sustain its burden[8] of showing this Court has jurisdiction. The jurisdictional claim being in error, the Petition should be denied.

**Questions Presented.**

1. Can an employer, found to have interfered with the statutory rights of the employer's employees and of a union by preventing union organizers' access to residences located on the employer's property, be ordered to permit union organizers reasonable access to the employees' residences?

2. Does the Due Process clause of the Fourteenth Amendment require a court reviewing the order of a state labor relations board to hold oral argument over, and to write an opinion setting forth its reasons for, upholding the labor board's order?

**Statutes Involved.**

California Labor Code Section 1152:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153.

California Labor Code Section 1153(a):

> It shall be an unfair labor practice for an agricultural employer to do any of the following:

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[8] *Republic National Gas Co. v. Oklahoma, supra*, 334 U.S., at 70-71.



> (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.

California Labor Code Section 1160.8:

> Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such person resides or transacts business, by filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.
>
> An order directing an election shall not be stayed pending review, but such order may be reviewed as provided in Section 1158.
>
> If the time for review of the board order has lapsed, and the person has not voluntarily complied with the

board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein such person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce such order by writ of injunction or other proper process. The court shall not review the merits of the order.

## Statement of the Case.

### 1. The Factual Background.

Petitioner is an agricultural employer engaged in the growing and harvesting of strawberries and tomatoes in the northern part of San Diego County.[9] The workforce fluctuates between fifty and two hundred fifty employees divided into two distinct, separately-compensated groups: (1) the "commuters,"[10] a small group of workers receiving the higher pay and a travel allowance and (2) the 'locals," known to the commuters as "illegals" or "wetbacks" because of their propensity to run when the INS appears at the ranch.[11] The "locals" received, at the time of the incidents giving rise to this proceeding, forty cents per hour less than the "commuters."[12]

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[9]Decision of the administrative law officer (hereinafter "ALO Decision"), App. A, p. 3. The factual background of this action is set forth at ALO Decision, pp. 3-8. These findings were adopted by the Board. Board Decision, App. B, p. 1.

[10]For background regarding the "commuter" phenomenon, see, *Saxbe v. Bustos*, 419 U.S. 65 (1974).

[11]ALO Decision, App. A, p. 6. When a Board agent went to the ranch to discuss this case, the INS (Immigration and Naturalization Service) appeared and numbers of workers were observed to flee across the fields. RT Vol. III, pp. 32-33.

[12]ALO Decision, App. A, p. 5; General Counsel Exh. 4 (payroll records).



Petitioner's property lies at the end of a road, with vehicular access to the ranch possible at only one location. A locked chain bars this entry, although a number of outside persons, including certain suppliers and a catering wagon,[13] have keys to unlock the chain.

The ranch property, in addition to the growing crops, provides a "residence" for a probably transient and fluctuating, but nonetheless always present, population of Petitioner's employees. The workers, the "locals," "live" in caves tunneled into ravines, plastic tents, cardboard boxes, and other impermanent structures. Holes dug into the ground, with grills on top, as well as a mobile propane stove, serve as kitchen facilities. Food supplies and personal items are vended to the workers from the catering truck, which enters the ranch not only during work but late in the afternoon.[14] A nearly-invisible community exists on the ranch property, interspersed with the growing crops; Petitioner's principals are familiar with the habitats of the workers on their property and condone, if not encourage, these perhaps startling, but certainly not unique, living arrangements for their employees.[15]

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[13]Because agricultural jobsites have few fixed facilities, catering wagons journey from field to field with snacks, coffee, lunch, etc. As will be discussed, the catering wagon serving Petitioner's property additionally supplies the "locals" with basic living supplies. See, RT Vol. II, pp. 28-29.

[14]ALO Decision, App. A, pp. 6-9. These findings are supported by extensive testimony by workers and by an INS agent: *E.g.*, RT Vol. I, p. 104 (foreman moves stove to location where people are working); RT Vol. I, pp. 167-168 (workers living in caves); RT Vol. II, p. 24 (living quarters visible); RT Vol. II, p. 58 ("locals" always on ranch); RT Vol. III, pp. 32-33 (workers ran in presence of owner when INS showed up); RT Vol. III, pp. 42-47 (INS has apprehended illegals and reported to ranch); RT Vol. IV, p. 5 (owner observed shelters).

[15]ALO Decision, App. A, pp. 6-7. These findings are amply supported in the record. For example, Harry Nagata, a principal in Petitioner, conceded he would look over the fields at night and see fires "all over" the property. RT Vol. IV, p. 25.

On November 26, 1977, the in-the-field "homes" of the "locals" were the focus of organizing efforts of United Farm Workers' organizers. The organizers sought to drive onto the ranch property to communicate with the workers about the union. The chain barred entry. The union organizers contacted one of Petitioner's principals, requested entry and were refused. The proceedings leading to the order challenged in this action were initiated on the basis of this refusal.

**2. The Administrative Proceedings.**

An unfair labor practice charge pursuant to the ALRA was filed with the Board on November 29, 1977. As amended, this charge alleged a violation of Section 1153(a)[16] on the basis that efforts to communicate with Petitioner's employees had been denied. Relief prayed for included, inter alia, unimpeded access to employee "residences" in the field. A complaint issued which encompassed the denial of access and other alleged unfair labor practices.[17]

A hearing was held before an administrative law officer ("ALO") on the unfair labor charges set forth in the complaint. After testimony was taken, a written opinion issued.[18] The opinion reveals the ALO's careful consideration of all issues, including Petitioner's contention that the fields were not inhabited by workers. The overwhelming, credible evidence contradicted Petitioner's contention. The ALO's proposed remedy weighed statutory rights against Petitioner's property interest to find the necessity for an order that United

[16]Hereinafter, unless otherwise noted, all statutory references are to the California Labor Code (West's Suppl. 1980).
[17]ALO Decision, App. A, p. 2; General Counsel Exh. 1(f).
[18]App. A.



Farm Workers' organizers be permitted reasonable vehicular access to the fields.[19]

Pursuant to the established procedures, this proceeding was transferred to the Board; exceptions were filed by Petitioner. The Board reviewed the case, adopted the ALO's findings, but further examined the ALO's access remedy. Noting the vulnerability of workers in the circumstances found on the record, the Board concluded that union access to the workers was necessary to protect the employees' Section 1152 rights. However, the Board modified the ALO's unrestricted access order to provide as quoted *supra* at p. 4.[20]

Review of this order was sought in the California Court of Appeal pursuant to Section 1160.8. After the filing of a complete record and extensive briefing of the issues,[21] review was denied. A Petition for Hearing was denied by the California Supreme Court.

[19]Petitioner has advanced the suggestion that the ordered vehicular access provides the breach of constitutional safeguards sufficient to compel granting the Petition. Petition, p. 10. The ALO carefully considered this issue, concluding that denial of vehicular access to United Farm Workers' organizers would unduly burden Section 1152 rights and that such denial would be discriminatory, since others are allowed unsupervised vehicular access. App. A, pp. 18-20. Given that Petitioner permits its workers to live scattered throughout the ranch, it cannot deny the organizers the only reasonable means of reaching the workers. Although it may be highlighting the obvious, if no employees reside on the ranch, the United Farm Workers cannot demand vehicular access. One suspects that if Petitioner were as vigorous in ousting the "locals" from its ranch as it has been in pursuing insubstantial issues in this proceeding, there would be no problem regarding vehicular access.
[20]App. B, pp. 3-4, 6-7.
[21]See further discussion at, *infra*.

## ARGUMENT.

### Summary of Argument.

To state an ostensible controversy cognizable by this Court, Petitioner obfuscates the issues actually delineated by the Board's order and, to be charitable, suggests interpretations of the facts belied by the record. Removing the veils which Petitioner drapes over the record uncovers the only, and quite simple, question justified: To the extent that Petitioner allows its workers to establish residence in cardboard boxes, plastic tents and other "shelters" on property under its control, can Petitioner, consistent with its property rights, be compelled, under a state labor relations statute, to grant union organizers reasonable access to these "residences"?

To obscure this issue Petitioner propounds a version of the applicable facts which mocks the factual findings of the Board. For example, in spite of admissions to the effect that Petitioner's principal watched the fires which nightly dotted the ranch[22] and that the current address of over two hundred employees was the ranch address,[23] Petitioner asserts this case properly involves residences not permitted on its property. This example, but one of those that could be delineated, highlights the extent the Petition seeks, and requires for the statement of a substantial federal question, this Court's weighing of the evidence and rejection of Board findings based upon substantial evidence. This Court's rules preclude the factual review sought by Petitioner.

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[22]RT Vol. IV, p. 25.

[23]See General Counsel Exh. 4; ALO Decision, App. A, p. 6. The ALRA and the Board's regulations and decisions (*e.g.*, *Mapes Produce*, 2 ALRB No. 54 (1976)) require an employer to maintain a list of current *residence* addresses of employees.



Even if the facts suggest, however tenuously, an issue of interference with Petitioner's property rights, the Board's accommodation of statutory and property rights is unimpeachable. Complying with the direction of *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976), the Board balanced the statutorily-protected organizational rights of the employees and the union against Petitioner's property rights. The result was a finding of the necessity for union access to the "housing project" in Petitioner's fields. The balance dictating reasonable access, Petitioner has no claim that its property rights have been impinged by the Board's order.

Finally, Petitioner seeks to challenge, on Due Process grounds, the appellate review accorded the Board's order. If properly before this Court, the Due Process claim is patently frivolous. The Fourteenth Amendment does not require any review; *a fortiori* the review granted here was constitutional. Additionally, to state its Due Process contention, Petitioner advances the unstated presumption that California's appellate court refused to perform its prescribed duty. Stripped of this unwarranted presumption, the question posed is whether oral argument and a written decision are constitutionally-compelled elements of judicial review of administrative decisions. The answer is no.

Thus, the Petition in this action should be denied.

### A. The Petition Should Be Denied Because It Essentially Seeks This Court's Reweighing of the Evidence.

Throughout the course of this proceeding Petitioner has advanced its ignorance of the "residences" dotting its ranch to justify denial of access. The credited facts undermine the claimed lack of culpability or responsibility:

> "It is not credible that [Petitioner] was unaware of the fact that workers lived on its property. . . . Nor is it

> credible that [Petitioner] has taken any meaningful action to prevent its workers from living on its property. On the contrary, it encourages them to do so by providing them access to the facilities listed above."[24]

These findings by the ALO, adopted by the Board, are supported by substantial, if not compelling, evidence. See, *supra*, at fn. 14.

The Petition to this Court persists in, and is founded upon, Petitioner's rejected factual claims.[25] Petitioner phrases the question before this Court in terms of the permissibility of required access to residences where workers live without permission. In light of the finding that Petitioner encourages, and economically benefits from the lower wages for, the "locals," the Petition must be viewed initially as a request by Petitioner for acceptance of its version of the facts; without the requested rejection of the facts as found by the Board, Petitioner's argument evaporates.

However, this Court consistently rejects invitations to reweigh findings supported by substantial evidence:

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence."
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> *Norton Co. v. Department of Revenue*, 340 U.S. 534, 538 (1951).

Thus, absent exceptional circumstances, findings of fact supported by substantial evidence will not be disturbed. *E.g., Time, Inc. v. Firestone*, 424 U.S. 448, 457-458

[24]ALO Decision, App. A, pp. 14-15.

[25]The factual statement presented to this Court parallels, to a substantial degree, the post-hearing statement of facts argued to the ALO.



(1976); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 159-160 (1952).[26]

Cursory review of the Petition in this case reveals that Petitioner essentially seeks this Court's reweighing of the evidence; the absence of any citation to the facts as found by the Board and the ALO highlights this conclusion. Well-settled principles preclude review to weigh the evidence. Since the Petition requires such proscribed review, it should be denied.

### B. The Board's Order Does Not Infringe Petitioner's Property Rights.

In light of the findings and order of the Board, the only possible question framed for this Court is whether reasonable access to workers (mostly undocumented) residing in Petitioner's fields unconstitutionally impinges Petitioner's property rights. The Board's order incorporates a well-reasoned balancing of the competing statutory and property interests and thus infringes no constitutionally-protected interest.

As a response to extensive organizing among farmworkers by the United Farm Workers and other unions, the California Legislature in 1975 enacted the ALRA to provide comprehensive regulation of labor relations in agriculture. The ALRA stated substantive regulation of employers and union and established an administrative framework for implementation of this regulation.[27]

Although the ALRA diverges statutorily and administratively from the National Labor Relations Act ("NLRA")

[26]In cases under the National Labor Relations Act, the court does not "displace the board's choice" on evidence on which there is a conflict. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

[27]See fn. 3, *supra*.

in specifics related to unique difficulties found in agricultural employment, the basic outline of the ALRA corresponds to that of the NLRA.[28] Most important and persuasive in this proceeding is that Section 1152, set forth *supra* at p. 4, incorporates those employee rights protected under Section 7 of the NLRA (29 U.S.C. § 157).

The interaction between employee's rights as set forth in Section 1152 and an employer's property rights in labor relations requires that property rights cannot stand as an impermeable barrier to organizing. Organizing and property interests must be weighed to accommodate properly their conflicting demands:

> "Under the [National Labor Relations] Act the task of the [National Labor Relations] Board, subject to review by the courts, is to resolve the conflict between § 7 rights and private property rights, 'and to seek a proper accomodation between the two.' *Central Hardware Co. v. NLRB*, 407 U.S. [539], at 543 [(1971)]. What is 'a proper accomodation' in any situation may largely depend upon the content and the context of the § 7 rights being asserted."
>
> *Hudgens v. N.L.R.B.*, 424 U.S. 507, 521 (1976).

This accommodation, which falls to the labor relations board in the first instance (*Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 504 (1978)), can encompass orders requiring union access to an employer's property. The Board correctly accommodated the respective rights of the union, the employees and Petitioner in concluding that Petitioner's denial of access "interfered with employees' Section 1152 rights"[29] and ordering access to the workers at their residences. Petitioner concedes the Board's unimpeachable weighing of

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[28]See, *Agricultural Labor Relations Board v. Superior Court, supra.*
[29]Board Decision, App. B, p. 3.



Section 1152 rights with Petitioner's property rights by the failure to suggest any impropriety in the accommodation reached. Brief review of the competing factors illustrates that the order requiring access is appropriate.

On the one hand, Petitioner assists and encourages the "locals" to live on its property in conditions of extreme deprivation. Petitioner ignores the responsibility of providing habitable residences and benefits economically from the patent fear in which the "locals" live. The large pay differential between the two classes of workers has been noted.[30] Petitioner, in attempting to deny access to preclude organizing, invokes interests more akin to management interests (see, *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803 n. 8 (1945)) than to property rights. The order here challenged does not infringe the uses of the property. *Compare, e.g., McDonald's Corp.*, 205 N.L.R.B. 404, 407 n. 18 (Opn. of ALJ) (organizational activities by employees in restaurant might interfere with customers). Petitioner permits its regular suppliers and the catering truck unrestricted vehicular access to the property. The Board's order places no unique burden on the use of the property.

Standing in stark contrast to the order's *de minimis* burdening of Petitioner's property interest is the effect upon Section 1152 rights if union access were denied. This case involves the intractable problem noted by the Chief Justice in *United States v. Ortiz*, 422 U.S. 891, 900 *et seq.* (Burger, C.J. conc.): The undocumented Mexican alien and his effect upon the domestic workforce. Petitioner has chosen to exploit this problem for its pecuniary benefit; the Union response, to protect its organizational interests and the rights of agricultural employees, has been efforts to organize the workers. Without the access ordered by the Board, such

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[30]*Supra.*

efforts would necessarily fail, for experience has revealed the necessity of access to workers at their homes for the protection of Section 1152 rights.

Many agricultural employees are illiterate or deficient in English, placing them beyond the reach of typical modes of worker communication. See, *Agricultural Labor Relations Board v. Superior Court*, 16 Cal.3d 392, 415, 128 Cal.Rptr. 183, 198, 546 P.2d 687, 702 (1976) *appeal dismissed for want of substantial federal question, sub nom., Kubo v. Agricultural Labor Relations Board* and *Pandol & Sons v. Agricultural Labor Relations Board*, 429 U.S. 802 (1976). The Board, after extensive hearings and its experience implementing the ALRA, has concluded that a worker's ability to receive communications at his residence is necessary to ensure the statutorily-protected right to collective organization. *Henry Moreno*, 3 A.L.R.B. No. 40, pp. 5-6. The National Labor Relations Board concurs in the conclusion that employee rights are unduly compromised when union access to workers at their homes is denied by the employer. See, *e.g., N.L.R.B. v. S. & H. Grossinger's, Inc.*, 372 F.2d 26 (2nd Cir. 1967); *N.L.R.B. v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948). The order here challenged follows from this experience.

The absence of any substantial constitutionally-protected property interest can be focused from another perspective. The reasonable exercise of the police power affecting the use or enjoyment of property has consistently been upheld. (*E.g., Goldblatt v. Hempstead*, 369 U.S. 590 (1962). The Board's order embodies a reasonable exercise of this power, causing only a minor, if any, inconvenience to Petitioner's property rights. Such an inconvenience does not breach constitutional protections. *Republic Aviation Corp. v. N.L.R.B., supra*, 324 U.S. at 802 n. 8, quoting from *N.L.R.B. v. Cities Service Oil Co.*, 122 F.2d 149, 152 (2nd Cir. 1941) (" 'Inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.' "); see also, *Consolidated Cigar v. Department of Public Health*, 372 Mass. 844, 851, 364 N.E.2d 1202, 1207 (1977). More starkly stated, a property owner cannot claim property rights as a justification for making the land upon which employees reside a "prison isolation block impervious to visitation." *United Farm Workers v. Superior Court [Buak]*, 14 Cal.3d 902, 910, 122 Cal.Rptr. 877, 882, 537 P.2d 1237, 1242 (1975).[31]



Thus, whether viewed as an accommodation of statutory and property interests or a reasonable exercise of the police power, the Board's order does not infringe a constitutionally-protected property interest. The absence of a substantial federal issue compels denial of the Petition.

**C. Petitioner Was Not Denied Due Process in This Case.**

Somewhat hesitantly Petitioner advances a claim that it was denied Due Process in the proceedings affirming the challenged order. Asserting, mistakenly, that judicial review was limited to a "summary denial the day after the briefs [were] filed,"[32] Petitioner, without citation of *any* arguably-applicable authority, claims a denial of constitutional Due

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[31]Since *Hudgens v. N.L.R.B., supra*, sustains the constitutionality of the challenged order, the fact that *United Farm Workers* provides an additional, state constitutional ground for access requires little discussion. As this Court often notes, where a decision can be sustained on grounds other than a constitutional one, the constitutional question will be deferred. *Hagans v. Lavine*, 415 U.S. 528, 543 (1974) ("the [statutory claim] was to be decided first and the [constitutional question] not reached if the statutory claim was dispositive."). Petitioner misreads the Board's decision in claiming that the access order in this case followed primarily from the dictates of *United Farm Workers*; this misreading yields the failure to consider the balancing of Section 1152 rights and property rights which the Board has performed with regard to the access issue.

[32]Petition, p. 11.

Process. Even if properly before this Court, this contention is specious.

The procedural history of this case provides the necessary backdrop for evaluation of the Due Process claim. After a full hearing before an impartial administrative law officer, a written decision issued, resolving factual disputes and proposing an order.[33] The proceeding was transferred to the Board, where Petitioner excepted to certain findings and the form of order proposed by the ALO. The Board, although affirming the finding of a violation of the ALRA and the necessity of an access remedy, accepted certain of Petitioner's arguments; the ALO's proposed access order was modified.[34]

Following the administrative proceedings, Petitioner, pursuant to Section 1160.8, filed a Petition for Review with the California Court of Appeal on June 21, 1979. A full record was certified to the Court of Appeal by the Board on June 27, 1979 and Petitioner's Opening Brief (of 46 pages) was filed on August 31, 1979. Responsive briefs by the General Counsel of the ALRB and the United Farm Workers were filed on October 1, 1979 and November 1, 1979 respectively. Petitioner submitted a reply brief on November 15, 1979. The Court of Appeal's summary denial issued the following day. A Petition for Hearing was filed with the California Supreme Court on November 26, 1979; this Petition was denied on December 13, 1979.

These facts, and the briefs actually filed, reveal that Petitioner was accorded, and utilized, every opportunity to present its arguments to the appellate courts. These arguments were before the Court of Appeal for over two months, contrary to the implication that summary denial followed

[33]App. A.
[34]App. B, pp. 6-7.



by one day the filing of briefs. Since Petitioner presents no facts to conclude that the Court of Appeal failed to perform its duty to exercise its "sound discretion" (*Tex-Cal Land Management Inc. v. Agricultural Labor Relations Board*, 24 Cal.3d 335, 351, 156 Cal.Rptr. 1, 10, 595 P.2d 579, 588 (1979)), prior to denial of the Petition for Review, the only question which emerges is whether a court reviewing an administrative order must "entertain oral argument and write an opinion." *Ibid.*

A jurisdictional consideration intrudes prior to examination of this question. Petitioner never asserted the constitutional invalidity of the review procedures under the ALRA to any California court. Title 28, U.S.C. Section 1257(3) requires that the constitutional issue must be "drawn into question." See, *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 476 (1975). Having failed to advance the Due Process claim to the California Supreme Court, certiorari jurisdiction cannot be asserted.

Assuming a Due Process contention is properly before this Court, Petitioner fails to state any remotely-cognizable constitutional issue. The assumption underlying the argument advanced[35] appears to be that appellate review of administrative decisions is constitutionally compelled. Yet, no case is cited (and none has been found) as mandating such review. The purported authorities advanced by Petitioner arose pursuant to review procedures of the federal Administrative Procedure Act (Title 5, U.S.C. Section 701 *et seq.*) and one case cited (*Morris v. Gressett*, 432 U.S. 491 (1977)) upholds denial of judicial review of an administrative decision by the Attorney General. Appellate review does not stand as a necessary component of Due Process:

[35]Petition, pp. 10-12.

"This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, [Citations] . . . ."

*Lindsey v. Normet*, 405 U.S. 56, 77 (1972); see also, *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 301 (1943) (administrative decision not subject to review).

In this action, Petitioner was accorded the necessary elements of Due Process: A full and fair hearing on the merits. Petitioner does not contend otherwise and Due Process was thus satisfied.

Even if the Due Process clause were found to require appellate review, the California procedure utilized in this case is immune to the claimed invalidity. As noted above, Petitioner had the opportunity to present its contentions to the Court of Appeal on the basis of a complete record. The only Due Process complaint available is the absence of oral argument and a written opinion.

Due Process does not dictate procedures, but allows for flexibility to accommodate the particular circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Prompt resolution of labor relations issues and prevention of the overburdening of appellate courts with unmeritorious petitions are substantial factors sustaining summary denial of insufficient petitions for review. Just as the summary judgment procedure reflects the interest in prompt disposition of cases without substantial dispute, the procedure under Section 1160.8 provides prompt affirmance of proper Board decisions. California's summary disposition of petitions in certain instances thus involves a choice between competing interests, which does not violate Due Process. Petitioner's Due Process claim should be recognized for what it is: An



attempt to introduce unnecessary delay in Petitioner's duty to comply with the Board's order. The Due Process claim is without substance.

**Conclusion.**

Contrary to Petitioner's assertion that this case involves the issue of First Amendment access to private property, the preceding discussion reveals that the challenged order of the California Agricultural Labor Relations Board is based upon an uncontested finding of Petitioner's clear interference with the statutory rights granted agricultural employees under the ALRA. Having chosen to encourage its employees to live in hovels and caves on its property, Petitioner cannot assert a constitutional interest of sufficient compulsion to bar access to these employees by United Farm Workers' organizers. No substantial federal question is presented. Thus, even if Petitioner has overcome the jurisdictional hurdle, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JEROME COHEN,

*Attorney for Real Party in Interest United Farm Workers of America, AFL-CIO.*

*Of Counsel:*
GEORGE C. LAZAR.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A.D. 1980.

_____

_____

Supreme Court, U. S.
FILED
JUN 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1448

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

NAGATA BROTHERS FARMS,

*Petitioner,*

vs.

THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,

*Respondent,*

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

*Real Party in Interest.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

## TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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No. 79-1448

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

NAGATA BROTHERS FARMS,

*Petitioner,*

vs.

THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,

*Respondent,*

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

*Real Party in Interest.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The petitioner, NAGATA BROTHERS FARMS, submits this reply brief in support of its request for review of the California Supreme Court's denial of a hearing to review the decision and order of the Agricultural Labor Relations Board, State of California.

### I

### THIS COURT HAS JURISDICTION

**A. The ALRB's Order Is Final.**

The ALRB's order is final for purposes of this Court's jurisdiction. The California Labor Code outlines a very narrow procedure for review of the merits of an ALRB decision. A

petition for review must be filed within thirty (30) days of issuance of the Board's order.[1] Issuance occurs when an order of the Board is mailed to a party to the proceedings. *Sunnyside Nurseries, Inc.* v. *Agricultural Labor Relations Board,* 93 Cal.App.3d 922 (1979). A final order of the ALRB is a decision of the Board either dismissing an unfair labor practice complaint *or directing a remedy* for an unfair labor practice. *Belridge Farms* v. *Agricultural Labor Relations Board,* 21 Cal.3d 551 (1978).

Under California Labor Code section 1160.3, an order of the ALRB cannot be modified or altered by the ALRB after it has been filed with a California court.[2] California Labor Code section 1160.8 also provides that the content of the order cannot be challenged during an enforcement proceeding.[3] Therefore, this employer has pursued its only avenue of judicial review of constitutional questions through its petition for certiorari.

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[1] California Labor Code § 1160.8.

[2] California Labor Code § 1160.3 provides in pertinent part:
"Until the record in a case shall have been filed in a court, as provided in this chapter, the Board may, at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."
In this case, the ALRB certified the record to the court of appeal on June 27, 1979.

[3] California Labor Code § 1160.8 provides in pertinent part:
"If the time for review of the board order has lapsed, and the person has not voluntarily complied with the board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein such person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce such order by writ of injunction or other proper process. *The court shall not review the merits of the order.*" (Emphasis added.)



Supreme Court review of an administrative order is appropriate even if the order or decision may subsequently be revised if there is no other way to preserve the constitutional issue. *North Dakota Pharmacy Board* v. *Snyder's Stores,* 414 U.S. 156 (1973). In addition, review of an administrative order is appropriate when denial of review would result in an unnecessary waste of time and energy in the judicial system. *Mills* v. *Alabama,* 384 U.S. 214 (1966). This Court should note that neither the real party in interest nor the ALRB has ever raised any question with respect to the finality of the ALRB's order in their briefs before either the California Court of Appeal or the California Supreme Court.

*Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62 (1948), cited by the ALRB and the UFW is not applicable here. The basis for the Court's decision in *Republic Natural Gas* is that price-fixing issues remained unresolved. According to the Court, price-fixing could easily raise new "inherent" constitutional claims. Furthermore, adequate compensation could resolve the controversy without further litigation. In this case, no new constitutional issues will be raised by any enforcement actions contemplated by the ALRB. The constitutional controversy in this case cannot be resolved without litigation so long as the ALRB accords union organizers unfettered vehicular access to portions of an employer's private property where illegal aliens or other individuals may be residing without the permission of the property owner. The remedy and order which petitioner objects to was based on this finding.[4] *Any* access to petitioner's property pursuant to this unconstitutional order would be in violation of petitioner's rights.

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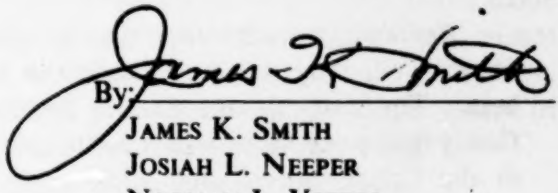
[4] The ALRB's decision and order states:
"In our view, the fact that respondent violated a right of access based on the U.S. Constitution rather than on our regulations does not make expanded access any less appropriate as a remedy." Appendix B to Petitioner's Writ of Certiorari, p. 4.

**B. Petitioner Has Promptly and Consistently Raised Each Constitutional Objection.**

Petitioner has consistently raised its constitutional objections to the decision and order of the ALRB to the California Court of Appeal and the California Supreme Court. Petitioner's due process objection was not raised prior to its petition for certiorari because petitioner's procedural due process argument did not fully ripen until the California Supreme Court summarily dismissed its petition for review.

Respectfully submitted,



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